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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

LLOYD N. CUTLER
JOHN H. PICKERING
WILLIAM R. PERLIK *
ANDREW B. WEISSMAN
WILLIAM R. RICHARDSON, JR.
JONATHAN I. FEIL
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000
Counsel for Petitioners Motor Vehicle Manufacturers Association of the United States, Inc., American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, and Volkswagen of America, Inc.

Of Counsel:
WILLIAM H. CRABTREE
Vice President and General Counsel
EDWARD P. GOOD
Senior Attorney
Motor Vehicle Manufacturers Association of the United States, Inc.
FORREST A. HAINLINE, JR.
Vice President and General Counsel
DANIEL P. GIMMY
Senior Attorney
American Motors Corporation

August 30, 1982

* *Counsel of Record*

[Additional Counsel Listed on Inside Cover]

RICHARD GOODYEAR
Vice President, General
Counsel and Secretary
MICHAEL W. GRICE
Attorney
Chrysler Corporation

HENRY R. NOLTE, JR.
Vice President—General
Counsel
JAMES M. MACNEE, III
Associate General Counsel
Ford Motor Company

OTIS M. SMITH
Vice President and General
Counsel
CHARLES R. SHARP
Assistant General Counsel
WILLIAM L. WEBER, JR.
J. DOUGLAS HAND
General Motors Corporation

N. RICHARD SKIPPER, JR.
General Counsel
GERHARD P. RIECHEL
Associate Counsel
Volkswagen of America, Inc.

MILTON D. ANDREWS
RICHARD A. PENNA *
DONALD M. SCHWENTKER
RIVKIN SHERMAN AND LEVY
900 Seventeenth Street, N.W.
Washington, D.C. 20006
(202) 347-6007
Counsel for Petitioner
Automobile Importers of
America, Inc.

* *Counsel of Record*

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, AS SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., AS ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AUTOMOBILE IMPORTERS OF AMERICA, INC., MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL, and EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION, MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK,
Intervenors

Petitions for Review of an Order of the
National Highway Traffic Safety Administration

Argued March 1, 1982

Decided June 1, 1982

James F. Fitzpatrick, with whom *Michael N. Sohn*, *Merrick B. Garland*, *John M. Quinn* and *Robert E. Litan* were on the brief, for petitioners in No. 81-2220.

Raymond J. Rasenberger, with whom *Lawrence C. Merthan*, *Frank J. Costello* and *Richard M. Hall* were on the brief, for petitioners in No. 81-2221.

David W. Allen, Assistant Chief Counsel, National Highway Traffic Safety Administration, with whom *Frank Berndt*, Chief Counsel, *Enid Rubenstein*, *Allan J. Kam* and *Eileen T. Leahy*, Attorneys, National Highway Traffic Safety Administration, were on the brief, for respondents in Nos. 81-2220 and 81-2221.

Lloyd N. Cutler, with whom *John H. Pickering*, *William R. Perlik*, *William H. Crabtree*, *Michael W. Grice* and *William L. Weber, Jr.* were on the brief, for intervenors Motor Vehicle Manufacturers Association, et al., in Nos. 81-2220 and 81-2221.

Ronald A. Zumbrun, *Raymond M. Momboisse* and *Sam Kazman* were on the brief for intervenors Consumer Alert and Pacific Legal Foundation, in Nos. 81-2220 and 81-2221.

Robert Abrams and *Stanley A. Camhi* were on the brief for intervenor Superintendent of Insurance of the State of New York, in Nos. 81-2220 and 81-2221.

Katherine I. Hall was on the brief for *amicus curiae*, Center for Auto Safety, Public Citizen, Physicians for Automotive Safety, and the American Academy of Pediatrics, urging reversal of the rescission of Standard 208.

Philip R. Collins was on the brief for *amicus curiae*, Automotive Occupant Protection Association, urging reversal of the rescission of Standard 208.

Dennis J. Barbour was on the brief for *amici curiae*, American College of Preventive Medicine and American Public Health Association, urging reversal of the rescission of Standard 208.

A. L. Zwerdling and *Stephen I. Schlossberg* were on the brief for *amicus curiae*, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (AFL-CIO), urging reversal of the rescission of Standard 208.

Debbie M. Zuckerman was on the brief for *amicus curiae*, Epilepsy Foundation of America, urging reversal.

Milton D. Andrews and *Lance E. Tunick* entered appearances for intervenor Automobile Importers of America, Inc.

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MIKVA.

Opinion concurring in part filed by *Circuit Judge* EDWARDS.

MIKVA, *Circuit Judge*: Petitioners in this action seek review of a final order by the National Highway Traffic Safety Administration (NHTSA) rescinding the automatic crash protection requirements of Federal Motor Vehicle Safety Standard 208 ten months before the standard's effective date. 46 Fed. Reg. 53,419 (Oct. 29, 1981) (Notice 25). The standard would have required that large and mid-size automobiles manufactured after September 1, 1982, and all automobiles manufactured after September 1, 1983, carry passive restraints such as airbags or "passive" seatbelts. Airbags are cushions stored under the dashboard that, when triggered by a

frontal collision, fill with stored or rapidly generated gas to protect the rider from collision with the car's interior. Passive seatbelts, also called "automatic" seatbelts, move into place automatically when a passenger enters a vehicle and closes the door. Petitioners State Farm Mutual Automobile Insurance Company (State Farm) and the National Association of Independent Insurers (NAII) challenge NHTSA's rescission of the standard as arbitrary, capricious, an abuse of discretion, and a violation of law as defined by section 10 of the Administrative Procedure Act, 5 U.S.C. § 706 (1976).

We agree. This case is complicated because it has far-reaching implications and involves a politically controversial safety standard, but the determining principle is simple. An administrative agency, possessing power delegated by the legislative branch of government, must comply with the legislative requirement that its decisions be reasoned and in accordance with the purposes for which power has been delegated. NHTSA's rescission of the safety standard presents a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate. NHTSA thus failed to demonstrate the reasoned decisionmaking that is the essence of lawful administrative action.

I. Background

The procedural history of the case before us is extremely complex. The standard that has now been rescinded was the subject of approximately 60 notices of proposed rulemaking, hearings, amendments, and the like between 1969 and 1981. There were separate adjudications before this court and in the Sixth Circuit, and successful as well as unsuccessful attempts in Congress to control the evolution of the regulation. A number of these events must be described in some detail before we

turn to the issues in this case, because they help to put into perspective the course of the agency's action.

A. *The Story of Standard 208 and Notice 25*

Congress enacted the National Traffic and Motor Vehicle Safety Act of 1966 (the Safety Act), 15 U.S.C. §§ 1381 *et seq.* (1976 & Supp. IV 1980), in response to the alarming number of deaths and personal injuries on the nation's highways. The stated purpose of the Safety Act was "to reduce traffic accidents and injuries to persons resulting from traffic accidents." 15 U.S.C. § 1381.[1] The Safety Act directs the Secretary of Transportation or his delegate[2] to issue motor vehicle safety standards that "shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a). In issuing these standards, the Secretary is also directed to consider "relevant available motor vehicle safety data," whether the proposed standard "is reasonable, practicable and appropriate for the particular type of motor vehicle or items of motor vehicle equipment for which it is prescribed," and "the extent to which such standards will contribute to carrying out the purposes" of the Safety Act. 15 U.S.C. § 1392(f)(1), (3), (4).[3]

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[1] These goals may be met by very different courses of action. NHTSA can act to prevent accidents, or to prevent injuries in the event of accidents—the so-called "second collision." The Senate Commerce Committee expressed concern that "[f]or too many years, the public's proper concern over the safe driving habits and capacity of the driver . . . was permitted to overshadow the role of the car itself. The 'second collision'—the impact of the individual within the vehicle against the steering wheel, dashboard, windshield, etc.—has been largely neglected." S. REP. No. 1301, 89th Cong., 2d Sess. 2-3 (1966), *reprinted in* [1966] U.S. CODE, CONG. & AD. NEWS 2709, 2710-11.

[2] The Secretary's general authority under the Safety Act has been delegated to NHTSA. 49 C.F.R. § 1.51(a) (1979).

[3] Although Congress intended that "safety shall be the overriding consideration in the issuance of standards," S. REP. No. 1301, 89th

Under these guidelines, the Department of Transportation (DOT) issued the original Standard 208 in 1967, requiring seatbelts in all cars. 32 Fed. Reg. 2408, 2415 (Feb. 3, 1967). By July 1969, however, DOT had concluded that the level of seatbelt use was too low to reduce traffic injuries to an acceptable level. It issued a notice of proposed rulemaking to consider "the prompt development and installation of passive restraint systems," 34 Fed. Reg. 11,148 (July 2, 1969), defined as protective systems that require "no action by vehicle occupants." 36 Fed. Reg. 8296 (May 4, 1971). The agency conducted a lengthy rulemaking proceeding on passive restraint systems. It revised Standard 208 in 1970 to include passive protection requirements, 35 Fed. Reg. 16,927 (Nov. 3, 1970), and after a series of modifications and petitions for reconsideration published a final amendment to Standard 208 in 1972. 37 Fed. Reg. 3911 (Feb. 24, 1972).

The Federal Register during this period provides a strong reminder of how frequently an agency sometimes acts to focus or clarify a regulation before the regulation is promulgated. Not all of the twenty-four notices

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Cong., 2d Sess. 6 (1966), *reprinted in* [1966] U.S. CODE, CONG. & AD. NEWS 2709, 2714, it recognized that "the Secretary will necessarily consider reasonableness of cost, feasibility and adequate lead time." *Id.* The Senate committee also stated that standards "are expected to be performance standards, specifying the required safe performance of vehicles but not the manner in which the manufacturer is to achieve the specified performance." *Id.* at 6, [1966] U.S. CODE, CONG. & AD. NEWS at 2714. At the same time, the Safety Act is "technology forcing" in the sense that developed technology need not be in use prior to its incorporation into a federal motor vehicle safety standard. *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d 1338, 1344 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979); *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659, 671-72 (6th Cir. 1972). "The promotion of motor vehicle safety through voluntary standards has largely failed. The unconditional imposition of mandatory standards at the earliest practicable date is the only course commensurate with the highway death and injury toll." S. Rep. No. 1301, *supra*, at 4, [1966] U.S. CODE, CONG. & AD. NEWS at 2712.

and amendments to the standard issued between 1970 and 1972 are important to the case presented to us here, but two of these modifications are significant. When the first notice, entitled "Inflatable Occupant Restraint Systems," was published in 1969, the agency's emphasis was clearly on airbags. 34 Fed. Reg. at 11,148. In 1971, however, the agency observed that "some belt-based concepts have been advanced that appear to be capable of meeting the complete passive protection options," leading it to add a new section to the standard "to deal expressly with passive belts." 36 Fed. Reg. 12,858, 12,859 (July 8, 1971).

The second modification relevant here was the subject of a separate notice issued on the same day. For the first time, perhaps because passive seatbelts had expressly been added to the proposed standard, the agency suggested that passive restraint systems contain an "emergency release" mechanism to facilitate extrication of passengers following a crash. The agency cautioned, however, that the emergency release capability could not be allowed to nullify the advantages of the passive restraint system:

> In the case of passive belts, it would be required that the release not cause belt separation, and that the system be self-restoring after operation of the release. An example of such a system would be a lever on the belt retractor that releases the locking mechanism, allowing the belt to pay out freely. The self-restoration requirement could be fulfilled, for example, by a lever that frees the belt only while continuous pressure is exerted, or by a time-delay mechanism. In the case of an air bag system, deflation could constitute the "automatic" release.

36 Fed. Reg. 12,866 (July 8, 1971).

In its final form, the 1972 version of Standard 208 called for "complete passive protection" on vehicles man-

ufactured after August 15, 1975. In the interim, vehicles built between August 1973 and August 1975 were to carry either passive restraints, or lap and shoulder belts coupled with an "ignition interlock" that would prevent starting the vehicle if the belts were not connected. Most car makers chose the second option, and the ignition interlock was one of the factors that caused the 1972 rule to founder in both the courts and in Congress. In *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d 659 (6th Cir. 1972), the Sixth Circuit held that "the Agency's decision to require passive restraints is supported by substantial evidence," but that the testing procedures required of passive belts did not satisfy the Safety Act's requirement that standards be "objective." *Id.* at 675. The Sixth Circuit's decision did not affect ignition interlocks, but by late 1974 the public's irritation at being unable to start a car without fastening seatbelts led Congress to reject the entire standard. The Motor Vehicle and Schoolbus Safety Amendments of 1974, Pub. L. No. 93-492, § 109, 88 Stat. 1482 (codified at 15 U.S.C. § 1410b) (hereinafter cited as the 1974 Amendments), effected two main changes. First, Congress banned any federal motor vehicle safety standard requiring ignition interlocks or continuous buzzers to warn that seatbelts were not in use. *Id.* § 1410b(b)(1).[4] Second, the 1974 Amendments sharply reduced DOT's discretion to modify Standard 208 in the future. If a modified standard could be satisfied by any system other than seatbelts only, the amended safety standard would have to be submitted to

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[4] 15 U.S.C. § 1410b(b)(1) states:

No Federal motor vehicle safety standard may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of, any continuous buzzer designed to indicate that safety belts are not in use, or any safety belt interlock system.

Congress where it might be vetoed by concurrent resolution of both houses. *Id.* § 1410b(b)(2).[5]

Predictably, the actions of the Sixth Circuit and Congress precipitated a new flurry of notices in the Federal Register. NHTSA proposed new warning systems to replace the prohibited continuous buzzers. *See, e.g.*, 39 Fed. Reg. 42,692 (Dec. 6, 1974). It postponed the effective date for passive restraint systems so as to comply with the mandate of Congress and the testing procedures required by the *Chrysler* decision. *See, e.g.*, 40 Fed. Reg. 16,217 (April 10, 1975). But most important, the agency had to comply with the congressional ban on ignition interlocks, and this had profound consequences for the case before us now. The 1974 Amendments were enacted on October 27, 1974. Nine months earlier, however, an agency rulemaking had reopened the question of emergency release mechanisms on passive seatbelts, 39 Fed. Reg. 3834 (Jan. 30, 1974), leading NHTSA to change its position of 1971 that these belts should not be detachable. In April 1974, NHTSA had adopted the suggestion of one automobile manufacturer that emergency release of passive belts be accomplished by a conventional latch—permitting belt separation—*provided the restraint system was guarded by an ignition interlock and warning buzzer to encourage reattachment of the passive belt.* 39 Fed.

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[5] 15 U.S.C. § 1410b(b)(2) states:

> Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—
>
> (A) have the effect of requiring, or
>
> (B) provide that a manufacturer is permitted to comply with such standard by means of, an occupant restraint system other than a belt system.

Section 1410b(b)(3) exempts standards otherwise prohibited by this section if the standards are promulgated in accordance with the legislative veto provisions of 15 U.S.C. §§ 1410b(c) and (d). *See* pp. 34-36 *infra*.

Reg. 14,593 (April 25, 1974). The newly enacted amendments to the Safety Act obviously made this provision untenable. Rather than return to the regulation as it was proposed in 1971, however, the agency simply eliminated the ignition interlock and buzzer requirements. 39 Fed. Reg. 38,380 (Oct. 31, 1974). Passive belts still were required to have an emergency release mechanism in the form of a latch mechanism that caused release at a single point by pushbutton action.

Despite these modifications, NHTSA retained its interest in a standard calling for mandatory passive restraints. It postponed the effective date of the requirement to August 31, 1976, but emphasized that this postponement was only for a single year. "The NHTSA intends to propose the long-term requirements for occupant crash protection . . . as soon as possible." 40 Fed. Reg. 33,977 (Aug. 13, 1975). Shortly before that date, however, Secretary of Transportation William Coleman initiated a new rulemaking on the issue. 41 Fed. Reg. 24,070 (June 14, 1976). After hearing testimony and reviewing written comments, Coleman suspended the passive restraint requirement altogether. Although he found such restraints technologically and economically feasible, the Secretary based his decision on the expectation that there would be widespread public resistance to the new systems. Instead of a mandatory passive restraint standard, Coleman proposed a demonstration project involving up to 500,000 cars with passive restraints in order to smooth the way for such a standard at some later date. Department of Transportation, *The Secretary's Decision Concerning Motor Vehicle Occupant Crash Protection* (December 6, 1976) (Coleman Decision), Joint Appendix (J.A.) 2065.

Coleman's successor as Secretary of Transportation, Brock Adams, reopened the passive restraint rulemaking only four months later. 42 Fed. Reg. 15,935 (March 24, 1977). Following another round of written comments

and a public hearing, Adams decided that the demonstration program was unnecessary. He issued a new mandatory passive restraint regulation, known here as Modified Standard 208. See 42 Fed. Reg. 34,289 (July 5, 1977). This regulation, covering eleven pages of the Code of Federal Regulations, 42 C.F.R. § 571.208 (1977), ordered a "phasing-in" of passive restraints based on vehicle size, beginning with large cars manufactured for the 1982 model year and extending to all cars manufactured for the 1984 model year and beyond.

Like its predecessor, the 1977 rule had to withstand testing in Congress and the courts. In *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979), this court upheld Modified Standard 208 as a rational, non-arbitrary regulation consistent with the agency's mandate under the Safety Act. Modified Standard 208 also fared well in Congress, which did not exercise its authority under the legislative veto provision of the 1974 Amendments. No action was taken by the full House of Representatives. The Senate committee with jurisdiction over NHTSA affirmatively endorsed the standard, S. REP. No. 481, 95th Cong., 1st Sess. (1977), and a resolution of disapproval was tabled by the Senate. 123 CONG. REC. 33,332 (1977).

Congress has plainly considered Modified Standard 208 politically controversial, however. Riders were attached to appropriation bills for 1979 and 1980 that prohibited DOT from implementing the passive restraint standard in those years. Pub. L. No. 95-335, § 317, 92 Stat. 435, 450 (1978); Pub. L. No. 96-131, § 317, 93 Stat. 1023, 1039 (1979). The passive restraint standard was not scheduled to be implemented until 1981, however, and these measures emphasized the need for experimentation and research. *See, e.g.*, H.R. CONF. REP. No. 1329, 95th Cong., 2d Sess. 14 (1978) ("The conferees intend that the language of this provision permits broad research and development activities related to the provisions of occu-

pant restraint standard No. 208"). Of far greater importance were congressional efforts in 1980 to modify rather than nullify the standard. *See, e.g.*, H.R. REP. No. 1371, 96th Cong., 2d Sess. (1980). These efforts, discussed in detail at pp. 39-47 *infra*, narrowly failed to become law, and Modified Standard 208 remained in effect.

Automobile manufacturers also reacted to Modified Standard 208. On May 22, 1978, NHTSA issued yet another notice of proposed rulemaking in response to a petition from General Motors (GM) concerning emergency release mechanisms on passive belts. GM sought reconsideration of the agency's 1974 decision to require latch mechanisms on passive belts.

> [V]ery little was known at the time of that decision regarding designs of passive belt systems. Further, automatic belt "defeat" rates were not a significant issue at that time since no mandate existed which would have required the use of passive restraints on all vehicles . . . . While this conclusion was fully justified at that time we do not believe it has the same degree of validity when applied to the mandatory incorporation of automatic restraint systems. As we noted previously maximum usage will be a major concern beginning with the effective dates of the mandate established in June 1977; thus necessitating additional consideration for designs which show promise in helping to ensure that vehicle occupants avail themselves of the inherent safety benefits of automatic belt restraints.

43 Fed. Reg. 21,912, 21,914 (May 22, 1978) (quoting GM proposal). Specifically, GM sought authority to use a "spool release" mechanism that would allow emergency exit from vehicles without requiring separation of the belt. NHTSA noted its "interest" in "the anticipated rate of installation of passive belts and in any passive belt designs that would seek to minimize the rate of dis-

connection." *Id.* at 21,913. It granted GM's proposal six months later, although in a broader form so as to permit even greater experimentation with emergency release designs. 43 Fed. Reg. 52,493 (Nov. 13, 1978). Automobile makers began gearing up to comply with the safety regulation; by October 1981, they had expended a substantial portion of $550 million capital investment necessary to produce the required equipment.[6]

In February 1981, approximately one month after taking office, Secretary of Transportation Andrew Lewis reopened the rulemaking yet again. 46 Fed. Reg. 12,033 (Feb. 12, 1981). He based his decision at least in part on "the fact that economic circumstances have changed since the standard was adopted in 1977" and the "difficulties of the automobile industry," citing high unemployment, sales "at a very depressed level," and losses "by even the largest of the domestic manufacturers." *Id.* Two months later, the agency ordered a one-year delay in the application of the standard to large cars, extending the deadline to September 1982. 46 Fed. Reg. 21, 172 (April 9, 1981). This notice also observed that the "economic situation of the industry and consumers and the economy as a whole have drastically changed since the standard was adopted in 1977." *Id.* at 21,174. On the same day, NHTSA proposed the possible rescission of the entire standard. 46 Fed. Reg. 21,205 (April 9, 1981). Both decisions were announced by the White House Press Office on April 6, 1981, as a part of a larger package of economic recovery measures. *See Actions to Help the U.S. Auto Industry* at A-34 (April 6, 1981), J.A. 1281, 1321. After receiving written comments and holding public hearings, NHTSA issued a final rule (Notice 25) that rescinded the passive restraint require-

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[6] *NHTSA Final Regulatory Impact Analysis, Rescission of Automatic Occupant Protection Requirements* (October 1981) (hereinafter cited as RIA), at VI-41, J.A. 203 (35% of manufacturers' budgeted capital for automatic restraints has already been spent).

ment, and amended Standard 208 to eliminate this requirement. 46 Fed. Reg. 53,419 (Oct. 29, 1981) (Notice 25). This court denied motions to stay the rescission in December 1981, and these petitions for review followed.

B. *NHTSA's Analysis in Notice 25*

The issues raised by Notice 25 are best introduced by a general discussion of the safety problem and the regulatory task faced by the agency. The starting point for both NHTSA and the petitioners in this action is the fact, based on survey data and accident reports, that American motorists overwhelmingly fail to use their seatbelts. The usage rate of seatbelts is not only low, but falling. In 1977, DOT estimated that usage of manual seatbelts was around 20%. 42 Fed. Reg. at 34,290. Today, NHTSA estimates that nationwide usage has fallen to 11%. 46 Fed. Reg. at 53,422.[7]

Although individuals must decide whether to wear a seatbelt, NHTSA and Congress have recognized that seatbelt usage has serious social consequences. It has been estimated that one American dies in a traffic accident every 11 minutes. S. REP. NO. 481, 95th Cong., 1st Sess. 2-3 (1977). NHTSA predicts that there will be 61,710 motor vehicle fatalities in 1984, and that "because of the growing number of small cars, passenger car occupant deaths could increase by as much as 7,000 by 1990." *NHTSA Final Regulatory Impact Analysis, Rescission of Automatic Occupant Protection Requirements* (October 1981) (hereinafter cited as RIA), at V-12 n.4, XI-3, J.A. 160 n.4, 263. A significant number of these deaths —and an even larger number of serious injuries—could be prevented if motorists wore seatbelts. The resulting

[7] The usage figures vary by car size, RIA at IV-20, J.A. 76 (17% subcompact, 10% compact, 8.5% intermediate, 7.9% full-size), and apparently by region of the country, *id.* at IV-31, J.A. 87 (survey showing difference of 25 percentage points between usage in Maryland and North Carolina).

benefits to society include reduced insurance premiums, lower medical and rehabilitative costs, and incalculable savings in terms of human tragedy. Estimating the value of these benefits is necessarily inexact, but estimates can be made. In 1977, for example, DOT predicted that passive restraints could prevent approximately 12,000 deaths and over 100,000 serious injuries annually. 42 Fed. Reg. at 34,298. In Notice 25, NHTSA estimated that if the usage rate of seatbelts rose from 11% to 60%, Modified Standard 208 would save 8,750 lives and 176,900 serious injuries each year. RIA at IV-71, J.A. 127. The agency estimates the long-term savings in various kinds of insurance premiums alone at $4.3 billion annually, if these fatalities and deaths could be avoided. *Id.* at V-14, J.A. 162.[8]

Investment in safety also has its costs, of course. In 1977, for example, Secretary Adams estimated that passive seatbelts would exceed the cost of manual seatbelts by $25 per car, and that installation of airbags would cost $112 per vehicle. 42 Fed. Reg. at 34,293. These

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[8] The RIA discussed automobile, health, and life insurance plans. It predicted automobile insurance reductions of $960 million to $2.9 billion annually, from the low to the high ends of the range. RIA at V-7, J.A. 155. The range of reductions in health insurance, government payments, and workers' compensation was $451 million to $1.4 billion annually. RIA at V-11, J.A. 159. Similarly, the annual reductions in automobile fatalities would save $6 to $26 million in life insurance annually. RIA at V-12, J.A. 160. These savings can also be expressed on a per-car basis, suggesting a present discounted value of $79 to $240 per car (using a 10% discount rate). RIA at V-14, J.A. 162. Such analysis is extremely sensitive to assumptions about the appropriate discount rate, of course. *See* RIA at A-5, J.A. 279 (change from 10% discount rate to 7% discount rate increases social benefits by 46%). The analysis also understates the expected savings because it deals only with reductions in insurance premiums, and makes no attempt to calculate the full social cost of traffic fatalities and injuries in such terms as lost earnings and reduced productivity. *See* RIA at A-4, J.A. 278 (estimating social cost of serious injuries at $15,140 and of fatalities at $314,100, assuming 10% discount rate).

costs have risen with inflation. In 1981, NHTSA estimated that the marginal cost of passive restraints would vary between $50 and $150 per vehicle. The average figure was $89, which includes $15 for added fuel costs over the life of the car. 46 Fed. Reg. at 53,423; RIA at VI-40, J.A. 202.[9] The cost of airbags has also risen sharply and depends to a great extent on the volume of production. If all vehicles manufactured annually were equipped with airbags, the resulting economies of scale would hold airbag costs to between $200 and $330 per car. At lower volumes, however, such as only 10,000 units a year, the cost of airbags could climb as high as $1,200 per vehicle. RIA at VI-10, J.A. 172. NHTSA

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[9] *See generally* RIA at VI-40 to VI-48, J.A. 202-210. Costs of equipment in the early years of the regulation's implementation would be higher, but would decline in the long run as restraint systems were incorporated in new vehicle designs as opposed to retrofitting existing vehicle designs. RIA at VI-42, J.A. 204.

NHTSA responded in several ways to criticism that it "has not adequately explained how the costs of automatic belts have more than doubled in constant dollars since 1977," when Secretary Adams estimated the marginal cost of passive belts to be $25. It stated that the earlier figure was based on the Volkswagen (VW) Rabbit system, which is not representative of larger cars. RIA at B-3, J.A. 287; *see id.* at VI-6, J.A. 168 (1981 retail price of VW Rabbit belts was $50, and 1981 retail price of GM Chevette belts was $65). Moreover, NHTSA's overall estimate of belt prices includes the cost of features that would not be required by the standard but that might increase consumer acceptance of passive belts. *See, e.g., id.* at VI-5, VI-36, J.A. 167, 198 (estimate includes cost of "luxurious" Toyota system, in which electric motor moves belt out of the way when door opens, at cost in excess of $300). The cost estimate even includes equipment that NHTSA is prohibited from requiring. *See id.* at VI-37, J.A. 199 (although VW Rabbit's interlock "adds an estimated $12 to the retail cost, we believe that this feature increases use and that its cost is properly attributable to the standard"). As NHTSA observed, "[i]t can be argued that fancy consoles, easy stowage, and retractor/reel features are not required for compliance, and therefore, should not be included as 'legitimate' standard-costs. Since usage is a function of consumer acceptance, it is difficult to draw a line." RIA at VI-40, J.A. 202.

estimated the cost of Modified Standard 208 to be approximately $1 billion per year. 46 Fed. Reg. at 53,423; RIA at VI-49, J.A. 211.

The regulatory problem facing NHTSA was therefore simple in theory, although extremely difficult in application. It had to predict the savings that would result from Modified Standard 208, and compare that savings with the cost of the standard, so as to conduct "a 'commonsense' balancing of safety benefits and economic costs." *United States v. General Motors Corp.*, 518 F.2d 420, 435 (D.C. Cir. 1975); *see H & H Tire Co. v. Dep't of Transportation*, 471 F.2d 350, 353-54 (7th Cir. 1972).[10] NHTSA found that the costs of the passive restraints required by Modified Standard 208 could be justified only if nationwide seatbelt usage rose by 13 percentage points, from 11% to 24%. RIA at A-10, J.A. 284. NHTSA concluded that no such increase would occur, and therefore rescinded the standard.

1. *Modified Standard 208 as written*

As discussed above, Modified Standard 208 as it stood in 1981 could have been satisfied by airbags or by either of two kinds of passive seatbelts. Both the "continuous" and the "detachable" passive seatbelts provide the emergency release mechanism required by the standard. On continuous belts, this mechanism may consist of a "spool-out" device that expands the belt but does not detach

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[10] *See* note 3 *supra*. NHTSA cautioned, however, that

> the conversion of safety benefits (i.e., lives saved and injuries avoided) into dollar figures is an improper and inappropriate method of reaching decisions on safety issues. [NHTSA should not be] charged with placing a dollar value on human life. Such a concept is offensive and the Agency has not been performing such calculations. . . . [W]hile costs and benefits must both be considered, safety is of overriding concern. Thus, regardless of the outcome of a dollar-based benefit-cost analysis, it cannot be used as the sole criterion for decisionmaking.

RIA at A-1, A-2, J.A. 275, 276.

it. On detachable belts, the mechanism allows separation of the belt in the same way that manual seatbelts are buckled and unbuckled.

In Notice 25, NHTSA first found it "reasonably certain" that if Modified Standard 208 were implemented, "the overwhelming majority of new cars would be equipped with automatic belts that are detachable." 46 Fed. Reg. at 53,421. Sixteen automobile manufacturers had participated in the rulemaking. Two stated that they planned to use the detachable belts; three said they expected to do so, although they did not make a definite commitment; five predicted that the automotive industry as a whole would rely on detachable belts, without discussing their own design plans at all; and the remaining six were silent on the question.[11]

NHTSA then analyzed the efficacy of the detachable passive seatbelt. Passive seatbelts—both detachable and continuous—have been in use for some years, and the record shows that these devices increase seatbelt use on every model.[12] NHTSA observed, however, that the data

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[11] GM and Chrysler were the only two car makers that explicitly stated an intention to use detachable passive belts. See J.A. 1220, 2549 (rulemaking comments). NAII challenges the interpretation given by NHTSA to the comments of other manufacturers on this point, NAII Brief at 23-24 (12 of the 16 manufacturers "gave no indication one way or another as to their plans for detachability features"), and State Farm suggests that "the record is not a model of clarity on this point." State Farm Brief at 40 n.51. Petitioners also contend that NHTSA committed procedural error in holding "secret meetings" with several manufacturers to obtain "a detailed breakdown of their planned automatic belt designs" after the public comment period closed. NAII Brief at 24 n.14; State Farm Brief at 40 n.51.

[12] Between 1975 and 1980, Volkswagen (VW) sold approximately 350,000 Rabbits equipped with detachable passive seatbelts that were guarded by an ignition interlock. General Motors (GM) sold 8,000 1978 and 1979 Chevettes with a similar system, but eliminated the ignition interlock on the 13,000 Chevettes sold in 1980. The 1980 Chevettes offered a lap/shoulder belt whose lap portion could

could be interpreted in greatly different ways.[13] It also questioned, for a number of reasons, whether the data could be used to predict overall usage rates under Modi-

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be detached from the socket on the car door. Finally, Toyota has offered a "spool release" continuous belt on some 1980 Coronas and on all 1981 Cressidas.

Although design features can increase the use of passenger restraints, no system yet conceived appears capable of bringing the usage rate anywhere near 100%. Even the ignition interlock required on cars between 1973 and 1975—arguably the most coercive belt system imaginable—succeeded in increasing belt usage only to roughly 60% in 1974. Consumers deactivated many of these devices and seatbelt use in those cars quickly fell to around 40%. *See Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1341 n.14.

Nevertheless, the passive belts thus far in use have shown striking results. Based on a variety of sources, NHTSA found that belt usage in the VW Rabbits averaged 34% for manual belts and 84% for passive belts. RIA at IV-52, J.A. 108. For the 1978-1979 Chevettes, NHTSA used figures of 34% for manual belts and 71% for passive belts. On 1980 Chevettes, the agency found these figures to be 31% for manual belts and 70% for passive belts. *Id.*, J.A. 108. No statistically valid data for the Toyota models appears on the record, although there is no suggestion that it would vary greatly from the other models. *See id.* at IV-29, J.A. 85 (based on 8 observations, 17% use of manual belts and 88% use of automatic belts).

[13] 46 Fed. Reg. at 53,422. The problem is predicting the effect of the automatic belts on the general population, where the average use is 11%, from data concerning vehicles on which even manual usage is at a much higher rate. One set of VW data, for example, suggested usage rates of 36% for manual belts and 81% for automatic belts. The difference made by passive belts could be interpreted either as showing an arithmetic increase of 45 percentage points, or as showing a multiplier effect of 2.3 times. Depending on whether the "additive" or the "multiplier" technique is used, nationwide rates could be predicted to increase to 56% or 25% respectively. NHTSA "used the results of these two techniques in an attempt to construct a range of possible increases in belt usage," and concluded that extrapolation from the raw data suggested "a range of 15 to 60 percent" could result. 46 Fed. Reg. at 53,422. *But see* RIA at IV-29, J.A. 85 (Opinion Research Corporation sample

fied Standard 208.[14] Finally, NHTSA analyzed the operation of the detachable belts, and found them functionally equivalent to manual seatbelts already in use.

> Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently . . . . Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of

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found 89.8% use of VW automatic belts, more than 63 percentage points higher than use of VW manual belts, in early 1981). Although NHTSA next argued that the lower end of this range was too high, it could therefore be suggested that the upper end of this range was too low.

[14] The agency noted four factors that it said made it impossible to generalize from the data on VW Rabbits and GM Chevettes to the general vehicle fleet. (1) *Car size.* Both the Rabbit and Chevette are subcompacts, and belt usage rates are typically higher in small cars than in large ones. *See* note 7 *supra.* (2) *Owner demographics.* Belt usage increases with educational level and income, RIA at IV-27, J.A. 83, and "Rabbit owners typically have higher education levels and earn more money" than the average car owner. *Id.* at IV-33, J.A. 89. (3) *Voluntarism.* "Having voluntarily invested in automatic restraints, [these users] are more likely to use those restraints than someone who is compelled to buy them." 46 Fed. Reg. at 53,421. (4) *Coercive use features.* The Rabbits and the 1978 and 1979 Chevettes were equipped with interlocks. NHTSA also described the belt system on 1980 Chevettes as "coercive," even though that model did not have an interlock, because the shoulder portion of the lap/shoulder belt was continuous. *Id.; see* note 12 *supra.* The last factor was considered the most important one. NHTSA concluded that the Rabbit interlock "would account for four-fifths of the [usage] increase observed in the automatic belt vehicles," and attributed a "significant portion of the remaining increase" to the fact that Rabbit and Chevette owners "knowingly and voluntarily bought the automatic belts. . . . This factor would not, of course, be present in the fleet subject to the standard." 46 Fed. Reg. at 53,422. *But see* note 30 *infra.*

> affirmative action that is the stumbling block to obtaining high usage levels of manual belts.

46 Fed. Reg. at 53,421.

NHTSA's final step was to predict the usage rate of detachable passive belts that could be expected under the standard. Although Notice 25 is somewhat unclear as to the precise finding, NHTSA clearly believed that any increase in usage would be minimal. The agency

> cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase. The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 or 10 percentage point increase.

46 Fed. Reg. at 53,423. NHTSA cautioned that "the agency is not able to agree with the assertions that there will be absolutely no increase in belt use as a result of automatic belts," *id.* at 53,425, but it repeatedly emphasized that any increase would be "extremely small due to the substantial similarity of the design and methods of using detachable automatic belts and manual belts" and that "detachable automatic belts may contribute little to achieving higher belt usage rates." *Id.* at 53,423.

Based on these three steps, NHTSA concluded that the savings from increased seatbelt usage under Modified Standard 208, if any, would not exceed the costs of the regulation:

> In view of the possibly minimal safety benefits and substantial costs of implementing the automatic re-

> straint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable.

46 Fed. Reg. at 53,423. It therefore concluded that the standard should either be revised or rescinded.

2. *Modified Standard 208 as NHTSA considered revising it*

NHTSA recognized that its analysis of detachable passive belts did not apply to other kinds of passive restraints. "[T]he question then arises whether the agency should amend the standard to require that automatic belts have a use-inducing feature"—*i.e.*, be continuous rather than detachable—that "would increase belt usage." 46 Fed. Reg. at 53,423. The agency rejected a refinement of the standard as "impracticable," however, for reasons of cost, equity, public reception, and safety.

Of these factors, only the last two received emphasis in Notice. 25.[15] NHTSA's first reason for not amending Modified Standard 208 to require "use-compelling fea-

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[15] The portion of NHTSA's decision explaining why it had decided against amending the standard takes up only a third of one page in its nine-page opinion. 46 Fed. Reg. at 53,424. Earlier in the decision, NHTSA foreshadowed the issue in recognizing that "the question then arises whether the agency should amend the standard . . . ." *Id.* at 53,423. The next three columns of the Federal Register appear to discuss only detachable belts, however. *E.g.*, *id.* (standard would cost too much because of uncertainty that "owners of cars with detachable automatic belts would receive offsetting discounts in insurance costs"); *id.* at 53,424 (negative effect on public attitude toward safety regulation because "detachable automatic belts may not be any more acceptable to the public than manual belts"); *id.* (standard would be inequitable because "the current regular user of manual belts" would be required "not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints"). *But see* notes 33, 43 *infra*.

tures" on passive belts drew on the negative earlier reaction to ignition interlocks. "The history of the Congressional action which removed this authority from NHTSA suggests that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system." *Id.* at 53,424. Second, NHTSA concluded that revising the standard to require only continuous belts would be "counterproductive" because of "irrational" reactions by users:

> Recent attitudinal research conducted by NHTSA confirms a widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash. Such apprehensions may well be contributing factors in decisions by many people not to wear a seat belt at all. . . . [I]t would be highly inappropriate to impose a technology which by its very nature could heighten or trigger that concern.

Id. Finally, NHTSA suggested that this concern might not be so "irrational" after all. It suggested that "there are compelling safety reasons" why continuous belts—even those with emergency release features—should not be mandated.

> In the event of accident, occupants wearing belts suffer significantly reduced risk of loss of consciousness, and are commonly able to extricate themselves with relative ease. However, the agency would be unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would.

Id.

Although these three reasons exhaust NHTSA's explicit discussion of its refusal to modify the passive restraint standard, it seems clear that the agency also relied on a fourth concern, albeit one stated only in the

context of detachable belts. Much of Notice 25 focuses on concern about public attitudes toward government safety regulations, suggesting that a backlash against a passive restraint standard "might cause significant long run harm to the safety program." *Id.* at 53,424. Because detachable passive belts and manual belts may be perceived as functionally identical, "it is not unreasonable to conclude that the public may regard the automatic restraint requirements as an expensive example of ineffective regulation." *Id.* Adverse public reaction might lead some car owners to "cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system," and could bring "a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future." *Id.* "A public that believes it is the victim of too much government regulation by virtue of the standard might well resist such parallel efforts [advertising campaigns and educational programs] to enhance voluntary belt usage." *Id.* at 53,425-26.[16]

II. The Scope of Review

Our review in this case proceeds under both the substantive sections of the Safety Act and the provision for judicial review of informal rulemaking in the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1976). Section 103(b) of the Safety Act, 15 U.S.C. § 1392(b), states that the APA "shall apply to all orders establishing, amending, or revoking a Federal motor vehicle

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[16] NHTSA's final point in Notice 25 was that it planned to "undertake a major educational effort to enhance voluntary belt usage," and that such an educational effort would be "at least as effective but much less costly than the installation of millions of detachable belts." 46 Fed. Reg. at 53,424-25. The agency promised to undertake this effort "entirely apart from the pending proceeding," but noted that "this effort will predominantly affect the same population that the automatic belts would be aimed at." *Id.* at 53,425.

safety standard." The 1974 Amendments further specify that "[s]ection 553 of title 5 [the APA] shall apply" to occupant crash protection standards promulgated under the congressional review procedures. 15 U.S.C. 1410b(c)(2). As a result, the standard of review appears easily formulated. It is well established that the familiar "arbitrary and capricious" test applies to informal rulemaking conducted pursuant to section 553 of the APA. *See, e.g., Camp v. Pitts*, 411 U.S. 138 (1973); *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1343.

The appropriate scope of judicial review remains the most troublesome question in this case, however, because we are called upon to review the rescission rather than the promulgation of an agency rule. The scope of review in such a situation appears to be a matter of first impression, even though judicial review of orders revoking a standard is specifically authorized by the Safety Act and the APA. The appropriate scope of our review is also a question of some complexity. At first view, rescission more resembles agency refusal to act than an agency decision to act, and the distinction has significance for the degree of judicial deference paid to the agency. As we recently noted in *WWHT, Inc. v. FCC*, 656 F.2d 807, 818-19 (D.C. Cir. 1981), it is only in the rarest and most compelling circumstances that courts overturn an agency's "'expert' determination not to pursue a particular program or policy at a given time." Although the *WWHT* court held that an agency's denial of a petition for rulemaking was subject to judicial review, the opinion emphasized that "the scope of review of such a determination must, of necessity, be very narrow." *Id.* at 809. In *Natural Resources Defense Council v. SEC*, 606 F.2d 1031 (D.C. Cir. 1979), the court reached a similar conclusion in reviewing a situation in which the agency terminated a rulemaking proceeding without issuing a rule:

> As is typical in informal rulemaking cases under section 4 of the APA, 5 U.S.C. § 553, many of the issues raised here are within the province of agency expertise and do not readily lend themselves to judicial oversight. . . . [O]ur review of the Commission's factual, and particularly its policy, determinations will perforce be a narrow one . . . .

Id. at 1052-53. These cases may be distinguished, of course, from the one before us. NHTSA has not denied a petition for rulemaking, or failed to issue a rule after a proceeding, but has rescinded a rule that has already been promulgated. Even so, the parallels are obvious, and dictate caution in formulating the appropriate scope of review here.

In recent years, however, courts have increasingly emphasized that the "arbitrary and capricious" standard encompasses intensive as well as deferential judicial scrutiny, depending in part on "the nature of the particular problem faced by the agency." *Natural Resources Defense Council*, 606 F.2d at 1050. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1972), the Supreme Court interpreted the arbitrary and capricious test to require a "substantial inquiry" subjecting the agency's action to "a thorough, probing, in-depth review."[17] The prior adjudications under the

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[17] In *City of Chicago v. FPC*, 458 F.2d 731, 742-45 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1074 (1972), this court followed *Overton Park* in explaining why judicial review of informal rulemaking must be "searching and careful," notwithstanding the "quasi-legislative" nature of such rulemaking. *See* generally Verkuil, *Judicial Review of Informal Rulemaking*, 60 VA. L. REV. 185 (1974); Note, *Judicial Review of the Facts in Informal Rulemaking*, 84 YALE L.J. 1750 (1975). For possible explanations of the increasingly careful judicial review of informal rulemaking, see DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257, 278-84 (1979) (suggesting that "presumption of reasoned neutrality" once given to agency action has been eroded by "the capture of regulatory agencies by special interests" and by

Safety Act concerning Standard 208 also illustrate that this review may be searching as well as deferential. Each decision reviewed NHTSA's issuance of the passive restraint standard for whether it was supported by "substantial evidence" within the meaning of 5 U.S.C. § 706(2)(E), even though in each instance the agency had promulgated the standard after informal rulemaking. In *Chrysler Corp. v. Dep't of Transportation*, the Sixth Circuit concluded that the substantial evidence test was required by the Safety Act, which mandates that "all of the evidence before the agency . . . shall be included in the record" submitted to the reviewing court. 15 U.S.C. § 1394(a)(1) (referring to 28 U.S.C. § 2112(b)). 472 F.2d at 668.[18] In *Pacific Legal Foundation v. Dep't of Transportation*, the court conducted a "thorough, probing, in-depth review" of the record, but declined to follow the Sixth Circuit's invocation of the substantial evidence test because any difference was "largely semantic":

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congressional creation of "the single-value agency"); Gellhorn & Robinson, *Rulemaking "Due Process,"* 48 U. CHI. L. REV. 201, 202 (1981) (agency power to employ informal rulemaking procedures was not confirmed until 1956, and format was still relatively little used for the next fifteen years).

[18] In *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1343 n.35, this court noted that the case for this approach was strengthened by the 1974 Amendments, which required that a public hearing be held on any proposed passive restraint standard. 15 U.S.C. § 1410b(c)(2). *But see* 120 CONG. REC. 35,636 (1974) (Representative Staggers) (under 1974 Amendments, DOT "would not be required to provide an adjudicatory hearing under sections 556 and 557 of title 5, United States Code; and judicial review of a standard promulgated under the section 125(c) procedure would not be under the 'substantial evidence' rule—since the agency hearing is not required to be 'on the record' "); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 336-37 (D.C. Cir. 1968) (rejecting argument that "record" meant "evidentiary record," and refusing to infer that Congress "in this unnecessarily oblique way" intended to subject agency's informal rulemaking to substantial evidence test).

> We do not follow this reasoning because we agree with the emerging consensus of the Courts of Appeals that the distinction between the arbitrary and capricious standard and substantial evidence review is largely semantic, and that "in the review of rules of general applicability made after notice and comment rulemaking, the two criteria do tend to converge." *Associated Industries of New York State, Inc. v. Dep't of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) . . . . [W]e agree with Judge Lumbard that "when an agency engages in substantive rulemaking, it abuses its discretion (or acts arbitrarily and capriciously) if its actions are not supported by substantial evidence." *Nat'l Nutritional Foods Ass'n v. Weinberger*, 512 F.2d 688, 705 (2d Cir. 1975) (Lumbard, J., concurring in the result).

593 F.2d at 1343 n.35. *See Recording Industry Ass'n v. Copyright Royalty Tribunal*, No. 80-2545, slip op. at 15-16 (D.C. Cir. Aug. 27, 1981); *Sierra Club v. Costle*, 657 F.2d 298, 323 n.67 (D.C. Cir. 1981); *Paccar, Inc. v. NHTSA*, 573 F.2d 632, 636 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1029 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 907 (1978); *Bunny Bear, Inc. v. Peterson*, 473 F.2d 1002, 1006 (1st Cir. 1973).

In short, although all parties in this case agree that we should apply the arbitrary and capricious standard of review, they differ markedly about the intensity and rigor with which that standard should be applied. NAII contends that there is a "heavy burden" on NHTSA to explain that its rescission is "rational and supported by substantial evidence." Brief for Petitioner NAII (NAII Brief) at 19. State Farm urges that our review be "intensive and exacting," Brief for Petitioner State Farm (State Farm Brief) at 21. Although NHTSA "welcomes the most intense scrutiny" and contends that Notice 25 is "supported by the evidence in the record," Brief for

Respondent NHTSA (NHTSA Brief) at 19, the agency also urges that we exercise "a high degree of deference to the agency's determination." *Id.* at 24 (quoting *Natural Resources Defense Council*, 606 F.2d at 1050).

Before we decide this question, it may be useful to ask why the same verbal standard of review should be given different scope in different contexts. Part of the answer was suggested in *Pacific Legal Foundation v. Dep't of Transportation*, where the court explained that its "probing" review was required by the fact that Secretary Adams' decision to issue the 1977 rule (Modified Standard 208) had come on the heels of Secretary Coleman's decision four months earlier that such a standard was not required:

> In addition, because the order under review here reversed a prior policy, the agency must provide "an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law."

593 F.2d at 1343-44 (quoting *Columbia Broadcasting System, Inc. v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971)). As Judge Leventhal observed over a decade ago, sharp changes of agency course constitute "danger signals" to which a reviewing court must be alert. *Joseph v. FCC*, 404 F.2d 207, 212 (D.C. Cir. 1968). He elaborated in a later case:

> Judicial vigilance to enforce the Rule of Law in the administrative process is particularly called upon where, as here, the area under consideration is one wherein the Commission's policies are in flux. An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . .

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1971). *See RKO General, Inc. v. FCC*, 670 F.2d 215, 223-24 (D.C. Cir. 1981); *Local 177, Democratic Union Organizing Comm. v. NLRB*, 603 F.2d 862, 882 (D.C. Cir. 1978) (agency must announce "principled reason" for reversal of policy).

The difficulty with these observations is that they blend judicial review of agency adjudications and licensing with review of agency rulemaking. Intuitively, at least, it seems obvious that concern for consistency in an agency's decisionmaking should be greatest when the agency departs from an adjudicative precedent or a well established licensing rule, and less grave when the agency reconsiders the value of a "quasi-legislative" rule of general applicability. Precedents by definition must be the basis for future reliance, and a sudden agency departure suggests that parties may have been treated unfairly. *See, e.g., Boston Edison Co. v. FPC*, 557 F.2d 845, 849 (D.C. Cir.), *cert. denied sub nom. Towns of Norwood, et al. v. Boston Edison Co.*, 434 U.S. 956 (1977) (should agency decide to reverse its course, it must give notice "and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect"). In contrast, even the eleventh-hour decision not to promulgate a regulation has less impact on regulated parties. This may explain why rulemaking proceedings that terminate short of agency actions, *e.g., Natural Resources Defense Council v. SEC*, 606 F.2d 1031, and agency decisions not to conduct rulemaking proceedings at all, *e.g., WWHT, Inc. v. FCC*, 656 F.2d 807, are tested under a "very narrow" reading of the arbitrary and capricious test. The agency's refusal to act may reflect its desire to use scarce resources on more pressing problems, or its judgment that a problem is trivial or nonexistent. *See Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958). Agency departure from

precedent raises obvious problems, but why should courts have similar concerns about erratic agency policymaking or reversals in the course of rulemaking?

The answer to this question lies in the fact that an agency is not a legislature.[19] Congress delegates rulemaking power in the anticipation that agencies will perform particular tasks. Reviewing courts are required to strike down agency action that exceed this mandate. *See, e.g.*, 5 U.S.C. § 706(2)(C). Even when there is no claim that the agency has exceeded its jurisdiction, as there is not in this case, sudden and profound alterations in an agency's policy constitute "danger signals" that the will of Congress is being ignored. The few cases in which agency decisions not to institute rulemaking have been overturned, for example, primarily involve plain errors of law, suggesting that the agency has been blind to the source of its delegated power. *See, e.g., NAACP v. FPC*, 520 F.2d 432 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662 (1976) (Commission erred in concluding that it lacked jurisdiction to promulgate regulations concerning racial discrimination by licensees); *NORML v. Ingersoll*, 497 F.2d 654 (D.C. Cir. 1974) (bureau erred in rejecting filing of petition for rulemaking for reasons going to the merits). *Cf. Los Angeles Women's Coalition v. FCC*, 584 F.2d 1089 (D.C. Cir. 1978) (per curiam) (remanding Commission's denial of hearing on petition to deny license for further development of factual issues). In

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[19] Indeed, the evolution of "arbitrary and capricious" review, *see* note 17 *supra*, may partially be explained by increasing judicial sensitivity to this fact. *See, e.g., Superior Oil Co. v. FPC*, 322 F.2d 601, 619 (9th Cir. 1963), *cert. denied*, 377 U.S. 922 (1964); *Flying Tiger Line, Inc. v. Boyd*, 244 F.Supp. 889, 892 (D.D.C. 1965) (informal rulemaking proceedings "are analogous to hearings conducted by Congressional Committees"); *cf. Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 186 (1935) ("the presumption of the existence of facts justifying its specific exercise attaches alike to statutes, to municipal ordinances, and to orders of administrative bodies").

Geller v. FCC, 610 F.2d 973, 979 (D.C. Cir. 1979) (per curiam), the court reversed the agency's "plainly misguided" refusal to consider the possible effect of newly enacted copyright legislation on its earlier regulations. As we recently described the *Geller* rule, "an agency may be forced by a reviewing court to institute rulemaking proceedings if a significant factual predicate of a prior decision on the subject (either to promulgate or not to promulgate specific rules) has been removed." *WWHT, Inc. v. FCC*, 656 F.2d at 819. This articulates in specific terms the general principle that administrative agencies derive their power from the laws of Congress and have no authority to act inconsistently with their statutory mandate. The same tenet may be identified in adjudications under 5 U.S.C. § 706(1) to "compel agency action unlawfully withheld or unreasonably delayed."

In determining the scrutiny with which the arbitrary and capricious standard should be applied to NHTSA's rescission of Modified Standard 208, then, we must first consider the extent to which NHTSA's action may be inconsistent with the congressional purpose behind the Safety Act. It may seem unusual to discuss this legislative history before a precise standard of judicial review has been formulated, but in this case there is no better way to undertake such a task.

A. *Standard 208 in Congress*

Our review of the legislative history of the 1974 Amendments to the Safety Act and the subsequent congressional reaction to Modified Standard 208 suggests that the standard has come as close as an agency-made regulation can come to being affirmatively endorsed by Congress, without Congress actually having done so. Although Congress has always considered the standard politically controversial, the regulation has received sufficient congressional approval to raise doubts that NHTSA's rescission necessarily demonstrates an effort to fulfill its

statutory mandate. Three separate periods of the standard's history in Congress merit close attention. The first is late 1974, when Congress banned the ignition interlock and continuous buzzer but did not foreclose NHTSA's pursuit of a passive restraint standard. The second period is late 1977, when NHTSA submitted Modified Standard 208 to both houses of Congress in accordance with the legislative veto provisions of 15 U.S.C. § 1410b, but concurrent resolutions of disapproval were not enacted. The final period is early 1980, when Congress contemplated new amendments to the Safety Act that would have refined Modified Standard 208 but would not have abolished it.

1. *Passive restraints in 1974*

In 1974, Standard 208 had not yet been modified by Secretary Adams. It called for the mandatory installation of passive restraints by August 15, 1976, and provided that during the preceding two-year period automobiles either should have passive restraints, or should be equipped with an ignition interlock and continuous buzzer to encourage use of manual seatbelts. As noted above, *see* p. 9 *supra*, the public reaction to the interlock and continuous buzzer was swift and furious, and a chief purpose of the 1974 Amendments was to ban them. Congress could not help knowing about the pending date for mandatory passive restraints, however, and the instructive aspect of the 1974 period is that Congress encouraged NHTSA to proceed with such a standard under carefully constructed legislative conditions.

The 1973 Senate bill for NHTSA authorizations contained no provision dealing with the passive restraint standard. *But see* 119 CONG. REC. 16,054 (1973) (Senator Magnuson) (noting that airbags "have proven to be both reliable and life saving," and proposing $3 million authorization "to equip General Services Administration vehicles with airbag systems"). In the House, however,

opponents of the ignition interlock broadened their criticism to include passive restraints as well. Representative Wyman, who later described himself as "the prime sponsor of the interlock prohibition," 120 CONG. REC. 35,637 (1974), proposed a broad amendment to the Safety Act that would have made it impossible for NHTSA ever to promulgate a standard requiring mandatory passive restraints. *Id.* at 27,822. Representative Moss proposed to amend this amendment so as not to affect the "pending regulation, which already has been published, on which comment has been received, for the passive restraint system to become effective" as planned. *Id.* But Representative Wyman insisted on his version, arguing that passive restraints should be available only as options, and the Wyman amendment passed overwhelmingly. *Id.* at 27,822-23.

When the House and Senate bills went to conference, however, the Wyman amendment was discarded. Instead, the conference version proposed:

> No occupant restraint system other than a belt system could become effective until Congress was given an opportunity to consider such standard for sixty days of continuous session (except that DOT could permit a manufacturer (at his option) to comply with a standard with a nonbelt system instead of a belt system).

H.R. CONF. REP. NO. 1452, 93d Cong., 2d Sess. 45 (1974). The Senate approved the report without a recorded vote, 120 CONG. REC. 35,037 (1974), but most relevant comments were favorable. Senator Magnuson suggested that

> exciting new technology on the immediate horizon . . . will save more lives than all of the other [motor vehicle] standards heretofore promulgated put together. . . . Congress has vested the Department with all of the authority it needs to get the job done. The burden is now with the Department to move

> forward with a sense of urgency. The problem is urgent.

Id. at 35,036; *see id.* (statement of Senator Hartke) (noting high benefit-cost ratios of passive restraint systems). The House also approved the conference report without a recorded vote, *id.* at 35,637, with Representative Wyman also urging its adoption, *id.*

As the 1974 Amendments were interpreted by members of Congress, NHTSA was required to follow four main steps before a "nonbelt" safety standard could be promulgated.[20] Representative Staggers, chairman of the House Committee on Interstate and Foreign Commerce with jurisdiction over the legislation, explained that the 1974 Amendments required (1) a modification in DOT's notice and comment requirements in order "to permit interested persons to present oral presentation"; (2) specific provision for "input" by members of Congress; (3) transmittal of any proposed standard to Congress; and (4) application of the legislative veto provisions of 15 U.S.C. § 1410b. *See* 120 CONG. REC. 35,636 (1974). With these conditions, the way was clear for NHTSA to try again. Congress obviously anticipated that a test of the passive restraint standard would come when a revised standard was sent to it on a later date. NHTSA complied

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[20] In presenting the Conference Report to the House, Representative Staggers emphasized that a "nonbelt" standard included standards that could be met by seatbelts *if they could also be met by nonbelts*. The legislative veto provisions affect "not only a standard which by its terms requires the system but also a performance standard which as a practical matter can only be met by use of that system. Thus, if an occupant restraint standard requires passive restraints, which as a practical matter can be provided only by an airbag or other nonbelt system, then the standard would be regarded as having the effect of requiring a nonbelt system." 120 CONG. REC. 35,635 (1974) (Representative Staggers). *But see Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1349 (declining to reach contention of petitioners that Modified Standard 208 was not covered by legislative veto provision of 1974 Amendments and should not have been submitted to Congress at all).

with these procedural requirements, and transmitted Modified Standard 208 to Congress on June 30, 1977.

2. *Passive restraints in 1977*

Concurrent resolutions to disapprove Modified Standard 208 were introduced in each house almost immediately upon congressional receipt of the standard. *See, e.g.*, 123 CONG. REC. 21,760 (1977) (resolution introduced by Senator Griffin on June 30, 1977); *id.* at 24,168 (seven identical resolutions introduced in the House on July 20, 1977). These resolutions were then sent to the appropriate committees. In the House, the Subcommittee on Consumer Protection and Finance of the Committee on Interstate and Foreign Commerce concluded hearings on September 23.[21] The subcommittee voted by voice vote to recommend to the full committee that the resolution of disapproval *not* pass. The full committee voted to table the resolution of disapproval on October 12. As a result, the standard was not considered by the House and no concurrent resolution of disapproval was passed.[22]

In the Senate, four days of hearings were held by the Consumer Subcommittee of the Committee on Commerce, Science, and Transportation. The subcommittee voted unanimously, 5-0, to disapprove the resolution of disapproval. The full committee voted by voice vote to report the resolution to the Senate, again with the recommendation that the resolution of disapproval not pass. S. REP. NO. 481, 95th Cong., 1st Sess. (1977). On October 12,

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[21] *Installation of Passive Restraints in Automobiles: Hearings before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate Finance*, 95th Cong., 1st Sess. (1977).

[22] The subcommittee and committee actions were not reported. This legislative history is recounted in S. REP. NO. 481, 95th Cong., 1st Sess. 2 (1977). *See* 123 CONG. REC. 33,318 (1977) (Senator Ford) (subcommittees and full committees "of both Houses of Congress . . . have voted with bipartisan support to uphold Secretary Brock Adams' decision").

the full Senate voted 65-31 to table the resolution. 123 CONG. REC. 33,332 (1977). Modified Standard 208 could have been disapproved only by concurrent resolution of both houses; neither house voted to disapprove the standard, and Modified Standard 208 thus went into effect.

Throughout the Senate review, Modified Standard 208 received not grudging acceptance but positive support. The Senate report stated that the standard "would provide major increased protection for front-seat automobile occupants" that could save "more than $3.5 billion annually." S. REP. No. 481, 95th Cong., 1st Sess. 2-3 (1977).[23] On the floor, one speaker after another affirmed the need for the standard. *See, e.g.*, 123 CONG. REC. 33,318 (Senator Ford) ("the hearing record contains overwhelming support for the Department of Transportation's rule"); *id.* at 33,319 (Senator Ribicoff) (noting "well proven" efficiency of airbags); *id.* at 33,320 (Senator Durkin) ("the only way to have our citizens protected by passive restraints is to mandate them"); *id.* at 33,325 (Senator Bentsen) (the rule is "in the best interest of the public . . . . [P]assive restraint systems are the most effective way to improve vehicle safety"); *id.* at 33,329 (Senator Magnuson) ("it is time to put this matter to rest"); *id.* at 33,330 (Senator Baker) (supporting standard because "there is ample evidence indicating that air bags are effective in preventing injuries, that they would save thousands of lives and prevent many more serious injuries annually if installed on all cars, and

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[23] Intervenor Motor Vehicle Manufacturers Association (MVMA) characterizes the committee's decision as "a 9 to 7 vote." Brief for Intervenor MVMA (MVMA Brief) at 49 n.55. This is by no means clear. As the Senate Report emphasized, "[t]he only record vote was on the motion of Senator Ford to amend the motion of Senator Griffin," so that Concurrent Resolution 31 be reported unfavorably rather than without recommendation. S. REP. No. 481, 95th Cong., 1st Sess. 25 (1977). The decision to report the resolution to the full Senate was made by voice vote, and only four of the sixteen members of the committee joined in the "minority views." *Id.* at 31 (Senators Cannon, Griffin, Goldwater, and Schmitt).

that they are not hazardous"). Even critics of the standard focused more on the desirability of further testing and promotion of the systems than outright opposition to the standard. *See, e.g., id.* at 33,322 (Senator Goldwater) ("trying to argue against the idea of saving lives is a lot like arguing against free beer and mother love. It is a difficult thing to do"); *id.* at 33,325 (Senator Cannon) (urging DOT to reinstitute Coleman demonstration project); *id.* at 33,327 (Senator Griffin) (seeking more experimentation or reinstatement of Coleman demonstration project).

3. *Passive restraints in 1980*

The refusal by Congress in 1977 to disapprove Modified Standard 208 did not terminate debate on the question of passive restraints. Opponents of passive restraints in the House criticized not only the standard, but the fact that the 1977 resolution of disapproval had been "bottled up" in committee, thus depriving its supporters of opportunity for floor debate. *See, e.g.*, 124 CONG. REC. H 5308 (daily ed. June 12, 1978) (Representative Shuster); *id.* at H 5313 (Representative Devine). As discussed above, *see* p. 12 *supra*, riders were attached to NHTSA appropriations bills for 1979 and 1980 that prohibited DOT from implementing the passive restraint standard in those years. Congress recognized that the standard was not scheduled to be implemented until 1981, however, and these measures did not interfere with NHTSA research and testing of passive restraints. *See id.* at H 5309 (Representative Conte); *id.* at H 5313 (Representative Staggers). Representative Dingell, a co-sponsor of the 1979 rider, observed that "[t]he amendment does not interfere with the progression toward the effective date, model year 1982, of the passive restraint standard." 125 CONG. REC. H 8055 (daily ed. Sept. 18, 1979).[24]

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[24] Other congressional voices during this period were favorable, however. In reporting on the National Traffic and Motor Vehicle

The passive restraint standard was again examined in great detail by the 96th Congress during deliberations on the Motor Vehicle and Cost Savings Authorization Act of 1980. The Senate bill, S. 1159, made no reference to the standard. *See* 125 CONG. REC. S 9166 (daily ed. July 11, 1979). When the House bill, H.R. 2585, came to the floor, a number of speakers praised the standard. *See, e.g., id.* at H 12,282 (daily ed. Dec. 19, 1979) (Representative Staggers) (standard will "save not one, but many thousands" of lives); *id.* (Representative Mineta) (noting "grave concern about any amendments that would have the effect of delaying implementation of the automatic restraint program," and that "[e]ach time the standard has been reviewed, it has been reconfirmed"); *id.* (Representative Maguire) ("we should go forward aggressively with this program"). Other speakers found it "disheartening" that "the Congress again appears to be going along with [NHTSA] in its continuing tendency toward excessive reliance on the airbag." *Id.* at H 12,283 (Representative Cleveland).

On the floor, however, Representative Stockman proposed an amendment to the Safety Act that would have denied NHTSA funds to enforce or administer an occupant restraint system

> unless such standard or regulation also permits the purchaser of a passenger car to select any occupant restraint system which, if installed in the passenger

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Information and Cost Savings Authorizations Act, the House Committee on Interstate and Foreign Commerce referred to a report two years earlier that had found

> a slackening in issuance of new vehicle safety standards since 1970, partly as a result of political pressure against the issuance of FMVSS 208, the passive occupant restraint standard . . . . Since the time of that report, the passive restraint standard has been issued and upheld by the Congress. . . . The committee believes that the agency is now making satisfactory progress in carrying out its legislative mandate.

H.R. REP. No. 1162, 95th Cong., 2d Sess. 9-10 (1978).

> car purchased by such purchaser, would comply with the requirements of Federal Motor Vehicle Safety Standard Number 208 (49 Code of Federal Regulations 571.208), relating to the installation of active seat belt systems, as in effect at the end of June 29, 1977.

Id. at H 12,285. Representative Stockman explained that the amendment "preserves the right of the consumer to choose either an active restraint system, which is the lap-shoulder belt that we have on cars today, or a passive restraint system, which in practice means the airbag for large cars, and the automatic seatbelt for small cars." *Id.*

Representative Scheuer, chairman of the reporting committee, did not oppose the Stockman amendment "because it is only a symbolic amendment with no real or direct legal impact on the Department of Transportation's passive restraint standard." *Id.* He explained:

> The standard is scheduled to go into effect beginning in 1982. This amendment, however, is an amendment to a 1-year bill authorizing the appropriations of funds for carrying out the National Traffic and Motor Vehicle Safety Act for fiscal year 1980 only. Further, the amendment continues to allow for the installation of airbags or passive seatbelts, while providing for an additional option—active seatbelts. This is an option which would have existed regardless of whether this 1-year amendment was adopted.

Id. Representative Stockman responded, however, that "this is a proposal we have not voted on previously. This is a compromise solution that is designed to mandate the introduction of these things into the market, mandate the offering of passive restraints on every car that is sold by any manufacturer in the U.S. market, but give the consumer the choice of which system he will actually choose to have on his car." *Id.* The Stockman amend-

ment passed overwhelmingly, 320-73. It should be noted that most of the members who had earlier praised Modified Standard 208—including Representatives Mineta, Scheuer, and Staggers—were among those voting with the majority. *Id.* at 12,287.

Like the Wyman amendment six years earlier, the Stockman amendment was also discarded when the House and Senate bills went to conference. The Conference Report proposed several important revisions to Modified Standard 208, however, in the form of a proposed amendment to the Safety Act. First, the amendment would have *accelerated* the date by which the standard applied to small cars. H.R. CONF. REP. NO. 1371, 96th Cong., 2d Sess. 15 (1980). The legislative history suggests two reasons for this change. "With the anticipated increase in smaller, more fuel efficient [and more dangerous] cars on the Nation's highways, it is in the interest of public safety that passive occupant restraint protection should be required in these cars as soon as possible." *Id.* Moreover, the standard as promulgated would not have applied to small cars until two years after the effective date for compliance on large cars, and it was felt that this "would place domestic manufacturers at a great disadvantage against foreign competition." 126 CONG. REC. S 13,499 (daily ed. Sept. 25, 1980) (Senator Cannon).

Second, the conference substitute recognized the trend by automobile manufacturers toward phasing out various large car models in favor of smaller ones. It therefore exempted "certain smaller manufacturers from having to install automatic occupant restraint systems in mid-sized cars that will [no longer] be produced after December 31, 1982," although these manufacturers would still be required to comply with the applicable requirements for models produced the following year. H.R. CONF. REP. NO. 1371, 96th Cong., 2d Sess. 15 (1980). Third, the conference substitute would have required that

> beginning with model year 1983, each seatbelt assembly installed in a passenger car must be detachable by the user in a manner which does not impair the subsequent reattachment and performance of the assembly. The conferees intend that the passive belt can be detached at any point, including one adjacent to the inboard anchor.

Id. at 17.

The final and perhaps most significant revision proposed by the conference report concerned airbags. The five automobile manufacturers with the largest sales—GM, Ford, Toyota, Nissan, and Volkswagen—would have been required to "tool and offer for sale" either as an option or as standard equipment airbags on at least one car line in any three of the four model years between September 1981 and September 1985. The conference report provided careful definitions of "tooling up" and "car line," [25] and added:

> It is clearly the expectation of the conferees that consumers have a meaningful choice in the market between vehicles equipped with automatic safety belts and with airbags. It is the hope of the conferees that the public will be informed of such choices and that automatic safety belts and airbags be made available at reasonable cost.

Id. at 16.

As Representative Maguire observed during the House consideration of the conference report, the requirement that larger car companies offer airbags "is a major

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[25] To "tool for production" meant that "a manufacturer must demonstrate that he has the capability for assembling cars with airbags on an assembly line in the customary fashion of the manufacturer." H.R. CONF. REP. No. 1371, 96th Cong., 2d Sess. 16 (1980); *see id.* (defining "car line"). "Further, it is the intent of the conferees that automatic safety airbags be made generally available and not limited to esoteric cars which are offered to a limited market for the purpose of frustrating the legislative intent." *Id.*

change in policy." 126 CONG. REC. H 10,196 (daily ed. Oct. 1, 1980). Prior to this time, proponents of the passive restraint standard had always emphasized that

> [t]he standard is a performance standard which does not require that any specific technology be utilized by automobile manufacturers . . . . Thus, the standard does not mandate that air cushion restraint systems (the air bag) be used. Passive belts may be used, or any other technology which meets the standard.

S. REP. No. 481, 95th Cong., 1st Sess. 1 (1977); *see id.* at 17-18 (explaining reasons for not requiring airbags as a mandatory option). Now, for the first time, a committee of Congress "has gone on record to assure consumers freedom of choice in the selection of restraint systems by requiring that some airbags be made available to consumers who want to buy them." 126 CONG. REC. H 10,196 (daily ed. Oct. 1, 1980) (Representative Maguire); *see id.* at H 10,194 (Representative Scheuer).

This "major change in policy" raised certain procedural problems, however, because Congress frowns on conference reports that depart significantly from the bills passed in the separate houses. The Senate adopted the conference report, without a recorded vote. 126 CONG. REC. S 13,506 (daily ed. Sept. 25, 1980). As had been the case in 1977, most comments on the standard were favorable. *See, e.g., id.* at S 13,502-03 (Senator Warner) (supporting "the concept for automatic occupant protection" because vehicle fatalities and injuries have reached "epidemic proportions,' costing society billions of dollars annually). In the House, however, points of order were raised against the conference report because of clauses 3 and 4 of House Rule XXVII, rules of scope and germaneness designed to prevent conferees from writing new legislation in conference.

In such a situation, the conference report may still be considered in two ways. The more common is to obtain

a rule from the House Committee on Rules waiving the points of order. Alternatively, the conference report can be considered under a suspension of the rules, although this requires a two-thirds vote before the report is passed. The sponsors of the 1980 conference report chose the second course, a highly unusual move suggesting their confidence that the report would be accepted. *See* 126 CONG. REC. H 10,194 (Representative Scheuer) ("The conferees carefully constructed a compromise which is simultaneously supported by [DOT and NHTSA] and which GM and Ford have both said they can live with"). The reaction in the House was mixed, however. *Compare id.* at H 10,204 (Representative Mineta) ("The agreement reached by the conferees is a strong endorsement of the automatic crash protection standard 208") *with id.* at H 10,198 (Representative Frenzel) ("this is the first time that the Congress will have ever mandated airbags by law and, because of that, in my judgment, this conference report ought to be rejected out of hand"). A majority of the House voted in favor of the report, 209-192, but this was less than the two-thirds vote required under the suspension of the rules.

The sponsors of the conference report then sought and obtained a rule that would waive points of order. H.R. REP. NO. 1500, 96th Cong., 2d Sess. (1980) (10-4 vote of House Committee on Rules in favor of such a rule); *see* 126 CONG. REC. H 11,912 (daily ed. Dec. 4, 1980) (Representative Bolling). This rule was strongly opposed on the floor, however, and was narrowly defeated, 165-168. *Id.* at H 11,918; *see id.* at H 11,912 (Representative Quillen) ("If we do not draw that line now, we will be inviting future conferees to write completely new legislation in conference in total disregard of the wishes of the House"). As before, however, Congress recognized that the battle over amendments to Modified Standard 208 did not prevent the standard from taking effect. Representative Dingell observed:

> Mr. Speaker, this is not a partisan question. . . . The question is not even whether airbags or passive restraints are going in, because under existing law passive restraints, as opposed to airbags, which include airbags but which also include other devices such as passive belts, are still required under regulation and some passive belts and others are and new ones will shortly be on the market.

Id. at H 11,913. Minutes later, Representative Dingell repeated that "if we reject this proposal, Airbags and Motor Vehicle Safety Standard 208, which is a performance standard, will still be in place and will not be affected by the action of the House in rejecting the action of a group of runaway conferees who have openly flaunted and disregarded the will of the House." *Id.* at H 11,916.

This latter effort to waive points of order against the conference report was made on December 4, 1980, the day before the end of session. On December 5, Representatives Dingell and Broyhill urged passage of "a compromise bill," H.R. 8379, which Representative Dingell explained "is again an attempt to see to it that the consumer has an opportunity for choice in the purchase of passive restraints without mandating air bags in passenger automobiles." 126 CONG. REC. H 12,119 (daily ed. Dec. 5, 1980). The compromise bill also proposed to reverse the effective dates of Modified Standard 208, requiring that small cars comply before large cars, but would have retained the requirement that all cars have passive restraints by 1984. A large number of the representatives who had voted *in favor* of the Conference Report now voted *against* H.R. 8379, however. Representative Leland commented:

> To reverse decisions that have been made in behalf of the people of America and their safety, in my estimation, is a matter of madness and in the vernacular of the community from whence I come, this bill is jive.

Id. at H 12,123. *See id.* (Representative Eckhardt); *id.* (Representative Conyers). A majority voted in favor of the compromise bill, 205-126. But because it too had been considered under a suspension of the rules, H.R. 8379 also was rejected, and never even came up for consideration in the Senate.

In summary, each of the three periods during which Congress closely considered the passive restraint standard represents a different type of legislative action. In 1974, Congress banned the ignition interlock but did not foreclose NHTSA's pursuit of a passive restraint standard. In 1977, Congress allowed the standard to take effect when neither of the concurrent resolutions needed for disapproval was passed. In 1980, a majority of each house indicated support for the concept of mandatory passive restraints, and a majority of each house supported the unprecedented attempt to require some installation of airbags. None of these acts carries the weight of positive law, of course. The 1977 failure to disapprove the standard cannot be read as a congressional enactment—even though it is easier to obtain a two-house veto than passage of a bill—and the 1980 efforts failed to become law. Reading this legislative history as a whole, however, suggests a congressional commitment to the concept of automatic crash protection devices for vehicle occupants that we may not take lightly.

B. *The Scope of Review in this Case*

Based on the legislative reaction to the passive restraint standard discussed above, we conclude that rescission of the standard must be subject to "thorough, probing, in-depth review" lest the congressional will be ignored. On the facts of this case, our review must be as "searching and careful" as the judicial review in *Pacific Legal Foundation v. Dep't of Transportation*, where the issue was the promulgation rather than the rescission of Modified Standard 208.

Mere legislative silence in the face of agency action is a hazardous basis from which to infer congressional approval of the agency's interpretation of the statutes involved. "However, a consistent administrative interpretation, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay v. FCC*, 443 F.2d 638, 646-47 (D.C. Cir. 1970); *see Udall v. Tallman*, 380 U.S. 1, 17-18 (1965). The Safety Act directs that the Secretary "shall" issue appropriate motor vehicle safety standards; ordinarily this term "is the language of command." *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) (Cardozo, J.). Despite the legislative battles over whether to specify an airbag requirement or when the standard should take effect, each time Congress reviewed the passive restraint standard it was essentially confirmed. "In the matter before us there is not merely silence, proposals languishing without any Congressional action, but positive action by Congress rejecting the limiting amendments." *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 706 (D.C. Cir. 1971). Although there may be situations in which an agency may repeal a regulation on no basis at all, such is not the case here. NHTSA is not writing on a clean slate; it cannot suggest that the congressional actions and failures to act described above have no bearing on the agency's freedom to regulate on this question. It follows that NHTSA has the burden of explaining why it has changed course, and of showing that rescission of Modified Standard 208 was reasonable.[26]

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[26] NHTSA denies that there has been any "fundamental policy change," NHTSA Brief at 19, and contends that placing the burden on NHTSA to sustain the validity of its action would "transgress the boundaries between judicial and legislative functions." *Id.* at 24. NHTSA's argument that there has been no policy change is somewhat disingenuous, however, because the agency immediately goes on to justify that change on the merits. *See, e.g., id.* at 20 ("The changed facts since the Adams decision required the Administrator to make a different decision"); *id.* at 19 (earlier Adams de-

This does not mean that NHTSA may not revoke the standard. If the agency clearly articulates a reasonable basis for that action, we must defer to the policy judgments and expertise of the agency. By no means may we substitute the court's judgment, or fail to "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). The line between substitution of judgment and judging whether action has been rational or arbitrary is sometimes fine, and to some critics imperceptible. We fully recognize, however, the side of that line from which the court derives its lawful authority. We also recognize that the course of administrative action is frequently and inevitably characterized by shifts and turns, as agencies continually reassess what is in the public interest. But courts are "not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 (1965). Judicial scrutiny of agency action—including the rescission of a rule—depends on the extent to which the agency has deviated from congressional expectations. An agency is seldom locked on course, but it must have increasingly clear and convincing reasons the more it departs from the path marked by Congress.

We therefore review NHTSA's rescission of Modified Standard 208 for whether the agency has engaged in reasoned decisionmaking, making actual judgments concerning the significance of the evidence in the record and

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cision "was itself a reversal" of the Coleman decision). *See generally* 46 Fed. Reg. at 53,419 (purpose of rulemaking was to ensure that standard "reflects the changes in circumstances since the automatic restraint requirements were issued"); RIA at II-7 to II-10, J.A. 33-36 (rising gasoline prices, economic downturn, lower automobile sales and rising unemployment required changing the standard).

supporting its decision with "reasoned analysis." *City of Charlottesville v. FERC*, 661 F.2d 945, 951 n.35 (D.C. Cir. 1981). We must ascertain the facts on which NHTSA relied, determine whether those facts have some basis in the record, and judge whether a reasonable decisionmaker could respond to those facts as the agency did. *Recording Industry Ass'n v. Copyright Royalty Tribunal*, slip op. at 15. The court must also assure itself that rescission is "based on consideration of the relevant factors," *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 802-03 (1978); *see Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977), and determine that NHTSA made "a considered evaluation of the presently available alternatives." *Pillai v. CAB*, 485 F.2d 1018, 1029 (D.C. Cir. 1973). With this statement of the appropriate scope of our review, we turn to the merits of NHTSA's action.

III. The Arbitrariness of Rescission

The rescission of Modified Standard 208 on the grounds stated by NHTSA was arbitrary and illogical for two general reasons. The agency has offered no evidence that seatbelt usage will fail to increase as was expected when the standard was first promulgated, and has therefore made no showing that the standard is unjustified as written. More important, NHTSA has failed to consider or analyze obvious alternatives to rescission, and has thus artificially foreclosed attempts to further the purpose of the Safety Act. *See Pillai v. CAB*, 485 F.2d 1018, 1027 (D.C. Cir. 1973). When the agency so narrows its options that it fails to heed the goals that Congress has asked it to meet, the agency violates its basic legislative mandate. Simply put, NHTSA's discussion of ways in which Modified Standard 208 could have been amended was wholly inadequate, and rescission was therefore arbitrary and unlawful.

A. *Modified Standard 208 as Written*

NHTSA made three findings in deciding that the standard as written could not be justified, and should either be amended or rescinded. First, most automobile manufacturers planned to use detachable passive belts. Second, once detached, a detachable belt "becomes identical to a manual belt." Finally, NHTSA "cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase." *See* 46 Fed. Reg. 53,421-23.

Although the petitioners challenge each step of this reasoning, we conclude that NHTSA's first finding was not unreasonable. The prediction of how industries plan to comply with an agency regulation is exactly the sort of factual question on which the agency's expert "administrative feel" deserves the greatest deference. It was not unreasonable for NHTSA to conclude, from the comments that appear in the record, that most manufacturers did indeed plan to install detachable passive seatbelts in order to comply with the passive restraint standard.[27]

NHTSA's second finding is also reasonable, although it is important to note the limitations of this finding. The observation that a detachable belt, once detached, is functionally equivalent to a manual belt, does not dictate any conclusion about the usage rate of detachable belts. Any suggestion that this finding alone leads to a prediction that usage rates under the two systems would be identical is inconsistent with NHTSA's third finding, which

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[27] *See* note 11 *supra*; MVMA Brief at 28 n.30. We recognize, of course, that although deference must be given to this agency finding, it may nevertheless be erroneous. *See* NAII Brief at 25 ("logic would suggest that given a choice between two passive restraint systems of equal cost and consumer acceptance, manufacturers would choose the one that is the safest"). Indeed, the primary empirical problem in this case arises precisely because automobile makers have *not* used detachable belts thus far in voluntarily providing passive restraints. *See* note 30 *infra*.

acknowledged that even detachable passive belts would make some difference in seatbelt usage.[28] The rationality of NHTSA's conclusion about the standard as written depends entirely on how well its third step—predicting usage rates with detachable belts—holds up.

In taking this third step, NHTSA turned the question on its head and thus totally misdirected its analysis. There may well be "substantial uncertainty" about the seatbelt usage rates that can be predicted if detachable belts are widely used. But the question is not whether evidence shows that usage rates will increase by the necessary amount, but whether there is evidence showing they will not. NHTSA has some burden, in other words, to show that a regulation once considered to prevent deaths and injuries efficiently can no longer be expected to do so. This evidence may take the form of statistical data or logical argument, but it must exist in some form. To state this point in the reverse, it would be unreasonable for an agency to promulgate a regulation simply because of "substantial uncertainty" that the status quo was any better. There must be *some* reason to support *any* reasoned decision.

There is not one iota of evidence to support NHTSA's conclusion that Modified Standard 208 as written will fail to increase nationwide seatbelt use by 13 percentage points or more. No logical reason has been suggested why even detachable belts—except under a certain condition whose frequency is not known—cannot lead to safety benefits that exceed their relatively small mar-

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[28] 46 Fed. Reg. at 53,425. This conclusion is certainly supported by logic, because whereas a *detached* belt may be "identical to a manual belt," a *connected* belt is identical to a passive restraint. If users at some point detach these belts, they may indeed leave the belts unattached for a series of their subsequent trips. When those users remember to reattach the belts, however, inertia is again on the side of belt usage. *See* note 33 *infra*.

ginal costs.[29] Statistics concerning usage rates of the passive seatbelts now in service suggest exactly the opposite, and NHTSA's conjectural efforts to distinguish these systems miss the point.[30] If, as NHTSA contends,

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[29] *See* note 9 *supra* (marginal cost of VW passive belts is $50). As NHTSA observes, "[w]ith car prices increasing annually by more than $1,000, the added price of automatic restraints, although not insignificant, is still a small portion of total increases and may go undetected by consumers." RIA at IX-4, J.A. 219.

[30] *See* note 12 *supra* (passive restraints now in use increase usage rates on particular models to between 70 and 90%). Although NHTSA refused to extrapolate from these statistics for the reasons discussed in note 14 *supra*, this merely left the agency with *no* data "which can be used to predict automatic belt usage." RIA at IV-55, J.A. 111. *See* NHTSA Brief at 36-37 (agency had a "total absence of empirical and attitudinal information on the readily detachable belt").

We note that NHTSA's reasons for refusing to extrapolate from the available data are extremely weak. Three of the four factors discussed in note 14 *supra* were undercut by the agency's own analysis. *See* RIA at IV-54, J.A. 110 ("generally it is not true" that voluntarism biases existing data, because a number of current users "did not know they were getting automatic belts and others accepted the automatic belt equipped car because it was the only car available with the other options they wanted"); *id.* (demographic argument "is somewhat, although not totally, negated" by adjusting data to acount for higher usage of manual belts; moreover, although VW owners may be atypical of the fleet, GM Chevette owners are not). NHTSA's final concern was that interlocks on some of these vehicles "would account for four-fifths of the [usage] increase observed." There are three major difficulties with this undocumented conclusion. First, although GM eliminated the interlock on the 1980 Chevette, the usage rate of passive belts on those models actually *increased* over the interlocks-guarded belts on 1978 and 1979 Chevettes. *See* RIA at IV-33, B-8, J.A. 89, 292 (38% incremental use on 1979 model, 39% incremental use on 1980 model). Second, NHTSA's surveys suggested that the high usage rates on current models should be attributed to factors other than the coercive effect of the interlock. *See id.* at IV-36, J.A. 92 (67% of VW owners in Opinion Research Corporation survey said they would use the passive belts even if there were no interlock); *id.* (same survey finding more favorable later impressions than first

the passive belts now in use cannot be the basis for predicting usage rates under Modified Standard 208, then only a well justified refusal to seek more evidence could render rescission non-arbitrary. *National Ass'n of Demolition Contractors v. Costle*, 565 F.2d 748, 751-52 (D.C. Cir. 1977). NHTSA could have conducted surveys or experimented with detachable belt prototypes, or it could have explained logically why usage rates with detachable belts would increase less than 13 percentage points. The agency did not do so; it rested its decision only on "sub-

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impressions of passive belts); *id.* at IV-40, J.A. 96 (focus group studies identifying common reaction to passive belts of "relief" that automatic belts could resolve conflict between what passengers feel they should do and what they actually do). *See generally* note 33 *infra*. Finally, the record suggests that the effect of interlocks may actually be relatively insignificant in promoting seatbelt use. *See* RIA at IV-39, J.A. 95 (NHTSA rental car survey showing 13% use of shoulder belts without interlock and 15% use with interlocks). *See generally* note 12 *supra* (interlocks in 1975 only succeeded in raising manual belt use from 20% to 40%).

In their briefs, NHTSA and MVMA suggest yet another reason not to extrapolate from current data. The alleged consumer resistance to the 1980 Chevette, *see* NHTSA Brief at 13 n.7, MVMA Brief at 57 n.66, is said to show that negative consumer reaction would have "an increasingly adverse effect on overall seat belt usage rates." NHTSA Brief at 58. Aside from the fact that post-hoc rationalizations of counsel carry no weight in our review of agency decisionmaking, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962), it is difficult to see exactly how speculation about abstract consumer preferences detracts from concrete data concerning current usage rates. As NHTSA observes, "GM's comparison of voluntary purchase of automatic belts in Chevettes to potential consumer reaction to mandated automatic belts may be fallacious." RIA at IX-4, J.A. 219. Consumers may voluntarily purchase passive restraints with low frequency for the same reason that vehicle occupants wear manual belts with low frequency, *i.e.* "people obviously have little information on either the safety risks inherent in motor vehicle travel or the relative benefit of belts, be they manual or automatic." *Id.* at IX-5, J.A. 220. *See id.* at IV-41, J.A. 97 (Americans view collision survival "in very unsophisticated terms," with "virtually no apparent awareness of 'secondary collision' "). *See generally* note 33 *infra*.

stantial uncertainty" about these rates. Its decision to rescind the standard thus was arbitrary because the decision was supported by no record evidence whatsoever.

We do not mean this portion of our opinion to seem simplistic. Implicitly, the perpetuation of a regulation also involves a decision that its continuation is worthwhile, and reasonable decisionmaking requires that this too be supported by reasons. If NHTSA was uncertain that Modified Standard 208 would lead to the required usage increase, it could reasonably have decided to suspend or amend the regulation rather than plunge ahead in the blind faith that the standard would succeed. Indeed, this was originally how the agency framed the questions that led to the most recent rulemaking proceedings.[31] But it is one thing to decide that evidence fails to show the wisdom of continuing with a regulatory program, and quite another to decide that evidence shows the regulatory program should be abandoned altogether. There is no evidence at all that detachable passive belts will fail to increase seatbelt usage by 13 or even 50 percentage points, and NHTSA thus went one step further than reason can support.

B. *Other Forms of Modified Standard 208*

NHTSA explicitly considered a series of alternative amendments to Modified Standard 208 before deciding to rescind the standard. Its notice of proposed rulemaking

> proposes a wide range of possible changes to the automatic restraint requirements . . . . The Department desires to ensure that it is taking the most effective and reasonable approach to addressing the serious safety problem posed by the low rate of

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[31] *See* text at note 32 *infra*. DOT noted its concern that several automobile manufacturers "plan automatic belts [sic] designs which have a release buckle identical to the buckle on current manual belt systems," with the result that "[u]sage could thus in fact turn out to be low." 46 Fed. Reg. at 21,176 (April 9, 1981).

safety belt use in all cars and by the steadily decreasing average size of new cars sold in this country.

46 Fed. Reg. at 21,205-06. The agency considered whether to reverse the sequence of compliance so that small cars would be required to comply before large cars, and whether to amend the standard so as to require simultaneous implementation on all car sizes. NHTSA also considered amending the standard in order to exempt the front center seating position, while retaining the requirements for the driver and front right passenger seats. In reviewing these possibilities, NHTSA's Regulatory Impact Analysis (RIA) was impressively thorough and careful.[32]

In striking contrast, neither NHTSA's decision nor its RIA devoted even a modicum of reasoned analysis to several far more obvious possible amendments to Modified Standard 208. The decision briefly discussed—and summarily rejected—amending the standard so as to eliminate compliance by detachable belts. The RIA, which was otherwise replete with economic and safety estimates and other data, did not once attempt to analyze the consequences of such an amendment. Even more striking is the agency's failure to consider amending the passive

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[32] *See, e.g.*, RIA at IV-63 to IV-71, J.A. 119-27. NHTSA's discussion of whether to delete the requirement of passive protection for front center seating positions was a model of careful analysis. *See id.* at IV-73, J.A. 129 (analyzing deaths by seating position); *id.* at IV-79, J.A. 135 (adjusting fatality figures for front right position to reflect the fact that bucket seats would prevent passengers from sitting in center seat); *id.* at IV-86, J.A. 142 (analyzing net impact on fatalities and injuries). In short, NHTSA devoted 15 pages of its RIA to a discussion that "has no relevance if the standard is rescinded," *id.*, but declined to analyze airbags or continuous belts because this "would be engaging in a mythical paper exercise" given the intentions of automobile manufacturers to comply primarily with detachable belts. *Id.* at IV-56, J.A. 112.

restraint standard so as to allow compliance with airbags only. In both the decision and the RIA, airbags are mentioned only in passing and only in the context of predicting that automobile manufacturers would not install them on a widespread basis. Absolutely no effort was made to compare the costs of airbags against their potential benefits, an omission that is particularly notable because none of the problems that NHTSA identified with passive belts appears to apply to airbags.

In proceeding as it did, NHTSA allowed itself to become captive to the ways in which it predicted automobile manufacturers would comply with Modified Standard 208. Lip service aside, there is no indication of the agency's awareness that it could act positively to develop a passive restraint standard that would advance the purposes of the Safety Act. Courts frequently observe that regulatory agencies do not function "as an umpire blandly calling balls and strikes for adversaries appearing before" them. *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). If NHTSA did not believe the standard as written would fulfill the standard's goals, its foremost obligation was to consider whether an amended standard could. The agency's reasons for not prohibiting compliance with detachable belts are hollow, and its analysis of requiring exclusive compliance with airbags is nonexistent. NHTSA was not required to follow either avenue, of course, but it may not reject these possibilities without reasoned discussion. In stating that "the central issue in this proceeding has become whether [detachable] automatic belts would induce higher belt usage rates than are occurring with manual belts," 46 Fed. Reg. at 53,425, NHTSA lost sight of its statutory obligation to devise the best passenger safety regulation it could. By artificially narrowing the options available—or ignoring those options completely—the agency acted in a totally arbitrary fashion.

1. *Continuous belts*

As in its assessment of Modified Standard 208 as written, NHTSA's discussion of whether to require only continuous passive belts starts by asking the wrong question. The issue is not whether exclusive reliance on continuous belts would be superior to detachable belts, but whether detachable belts comply with the passive restraint standard at all. NHTSA boldly declared that "[o]nce a detachable automatic belt is detached, it becomes identical to a manual belt. . . . [I]ts use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts." 46 Fed. Reg. at 53,421. If so, the obvious question is whether detachable belts conform to the requirements of the passive restraint standard, which requires compliance "by means that require no action by vehicle occupants." 49 C.F.R. § 571.208, S4.1.1.1. Whether a detachable belt is in fact a passive restraint may depend on the usage rates of these belts—a matter that NHTSA has not yet established. But if detachable belts do not comply with the passive restraint regulation, NHTSA should have concentrated its analysis on safety devices that do.

Time after time, members of Congress as well as NHTSA have emphasized that a safety restraint requiring affirmative action is not a passive restraint. For the last decade, the agency has explained that a passive restraint requires "no action other than would be required if the protective system were not present in the vehicle." 36 Fed. Reg. at 8296 (May 4, 1971). "The essence of a passive restraint is that it provides at least the minimum level of protection without relying on occupant action to deploy the restraint." 39 Fed. Reg. at 14,594 (April 25, 1974). "Automatic restraints are systems that require no action, such as buckling a seat belt, by vehicle occupants to be effective." 46 Fed. Reg. at 12,033 (Feb. 12, 1981). *See* 123 CONG. REC. 33,321 (1977) (Senator Griffin) (a passive restraint "is something that

does not require any activity on the part of the occupant of the car"); S. REP. No. 481, 95th Cong., 1st Sess. 1 (1977) ("Passive restraints are defined in the rule to mean any front seat occupant restraint which protects the occupant . . . without the occupant having to activate it"). It is difficult to imagine an agency decision that could be more irrational than rescinding a regulation because of problems identified in industry actions that do not comply with that regulation. If detachable belts function as poorly as NHTSA says they would, then NHTSA's discussion of these belts is worse than irrelevant because detachable belts are not passive restraints at all.

Modified Standard 208 is a performance standard, which means that compliance may be in the form of any technology "which meets the standard." S. REP. No. 481, *supra*, at 1; *see* 123 CONG. REC. 33,318 (1977) (Senator Ford) ("any technology which meets the standard can be utilized"). It is almost embarrassingly obvious that technology that does *not* meet the performance standard may *not* be used. NHTSA's discussion of detachable belts versus continuous belts ignores this elementary point. Its decision not to amend the standard so as to allow only continuous passive belts is therefore fundamentally flawed by NHTSA's failure to consider that the standard might only permit use of such belts in the first place. Essentially, the agency seems to conclude that because some technology will *not* meet the passive restraint standard, it need not mandate compliance by technology that will. The absurdity of this Orwellian reasoning is obvious.

The explicit reasons stated by NHTSA for refusing to mandate compliance only with continuous passive belts also seem capricious. The first reason stated was the congressional prohibition on interlocks, and the fear that "Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt

system." 46 Fed. Reg. at 53,424. NHTSA's discussion of the interlock is absolutely irrelevant, of course, because the 1974 Amendments prevent it from mandating such devices. Of more serious concern is NHTSA's apparent belief that interlocks and other "use-compelling features" are equivalent. There is absolutely no evidence to support such a conclusion; indeed, every indication in the record points the other way.[33] The distinc-

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[33] *See, e.g.*, 42 Fed. Reg. at 34,290 (Secretary Adams distinguished interlocks from passive restraints because interlock requires affirmative action whereas passive restraints, by definition, do not); 36 Fed. Reg. at 8296 (May 4, 1971) (interlocks require "forced action" and thus do not qualify as passive restraints); *Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1346 (approving this reasoning); RIA at II-4, J.A. 30 (noting same distinction).

The importance of this distinction deserves emphasis. NHTSA devoted much of its analysis to the question of why current seatbelt use is low. *See* RIA at IV-25, J.A. 81 (1978 survey by Teknekron, Inc., finding following reasons for not using belts: "bothersome, inconvenient, forgot," 68%; "uncomfortable," 14%; all other responses, less than 8%); 1981 National Safety Belt Study, J.A. 1108 (hereinafter cited as *Study*) ("too much time/hassle," 25%; "not in habit/don't think about it/lazy," 22%; "uncomfortable/too confining," 20%; all other responses, less than 7%); RIA at IV-27, J.A. 83 (GM-funded survey finding that riders "who get in the habit of attaching belts, as part of a check-off system to start the car, habitually wear them"). *See generally* Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 BELL J. ECONOMICS 27, 29-35 (Spring 1981) (decision whether to wear seatbelt involves "a very low probability (on the order of 10^{-4} or 10^{-5}) of very adverse outcomes (i.e., serious injury or loss of life)," suggesting that low seatbelt use reflects the "limited capability of individuals to attend to rare events"). These are exactly the factors that automatic restraints are intended to address. *See id.* at 36 ("striking difference" between usage rates of VW manual and automatic belts "suggests that discomfort costs are not the key reason for the observed nonutilization of manual belt systems. In particular, VW was able to shift the habitual behavior of car occupants from nonusers to users simply by eliminating the time and discomfort costs of buckling up, while at the same time imposing small but real costs on those who might be inclined toward nonuse.").

tion lies in the use that is "compelled": interlocks require affirmative action, but continuous passive belts do not. The very concept of a passive restraint standard presupposes "use-inducing" safety equipment. NHTSA's argument about congressional disfavor toward continuous belts, based only on the fact that such belts would work better than detachable belts, is thus belied by the legislative history discussed above.

Had Congress desired to repeal the passive restraint standard in 1974, it was free to do so. Instead, Congress legislated with great specificity concerning the aspects of the standard that it wanted to change—requiring, for example, that a warning buzzer not exceed eight seconds in duration—and retained the explicit right to review other aspects of the standard at a later date. The possibility of a later legislative veto is far different from a legislative prohibition, however, and NHTSA assumes too much when it tries to read into this congressional action a hostility to an effective passive restraint standard. NHTSA errs when it presumes that it knows how to speak more clearly than Congress. The 1974 Amendments do not provide the slightest support for NHTSA's refusal to consider a passive restraint standard that could be satisfied with continuous but not detachable belts.

The last two explicit reasons given by NHTSA for refusing to mandate compliance only with continuous belts are somewhat inconsistent: the public's "widespread, latent and irrational fear" about being trapped by seatbelts, and the concern that a "use-compelling feature" could not be required consistent with "the cause of safety." *Id.* Considerable doubt exists about the strength of the first finding.[34] More important, NHTSA's

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[34] This finding was based on the *Study*, *supra* note 33, in which fear of being trapped was given by 7% of the respondents as a reason for not wearing seatbelts. This factor thus seems to have little relevance to why vehicle occupants fail to use seatbelts, *see*

second finding—clearly more fundamental to any agency charged with mandating safety standards—is squarely contradicted by the explicit requirement of an "emergency release mechanism" in the passive restraint standard. *See* 42 C.F.R. § 571.208, S4.5.3.3(a). NHTSA has not suggested, nor is there any evidence for such a proposition, that the emergency release mechanisms on continuous belts are any more susceptible to jamming or locking in the event of a collision than the latch mechanisms on detachable or manual belts. Indeed, for all that appears on this record, the emergency release on a continuous belt may be *more* dependable than that on a detachable belt. In any event, NHTSA also notes that if an accident occurs, "occupants wearing belts suffer significantly *reduced* risk of loss of consciousness, and are commonly able to extricate themselves with relative ease." 46 Fed. Reg. at 53,424 (emphasis added). There is no evidence to support the suggestion that "further

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note 33 *supra*. More important, this factor appears to be overemphasized in NHTSA's analysis: "Nearly all previous studies have shown a 'hard core' population (20-40 percent) of car occupants who will not wear a belt under any circumstances." RIA at IX-5, J.A. 220. *See generally* note 12 *supra* (interlock increased usage to 40%, and even passive belts have not increased usage more than 90%). Because a passive restraint standard would be economically justified if usage increased 13 percentage points, *see* text at note 10 *supra*, the existence of this "hard core" of nonusers seems irrelevant.

The petitioners also attack NHTSA's reliance on this limited finding from the *Study* on procedural grounds, noting that the *Study* was entered into the rulemaking docket only two days prior to the date that Notice 25 was announced and thus without giving the parties an opportunity to evaluate and comment on its findings. *See Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974). NHTSA responds that "the study was not critical to the outcome of the rulemaking" because it duplicated other evidence in the record, and thus "the procedural error, if any, was harmless." NHTSA Brief at 56 n.22. Because of our disposition of this petition for review, we do not reach this question.

complicat[ing] the extrication" of occupants after collisions, if that occurs at all, will not be more than offset by the advantages of increased belt use.

Instead, there is every indication here that continuous belts—which would not require or be guarded by interlocks—would increase belt usage more than enough to meet the agency's justifiable concerns about the standard's cost.[35] Such belts could never "become identical to a manual belt," *id.* at 53,421, and clearly "would increase belt usage." *Id.* at 53,423. NHTSA has not analyzed the magnitude of this increase, or whether a standard permitting continuous belts only would make Modified Standard 208 the cost-effective regulation that Congress expected it to be. If continuous passive belts worked effectively, of course, this would dispatch NHTSA's implicit concern about public backlash against "an expensive example of *ineffective* regulation." *Id.* at 53,424 (emphasis added). Until NHTSA at least analyzes the consequences of a continuous-belt-only standard, there is no way to know whether this form of the passive restraint standard is justified. At the same time, until NHTSA considers this obvious alternative, its rescission of the entire standard must be considered arbitrary.

2. *Airbags*

If NHTSA's consideration of continuous belts was minimal, its analysis of airbags was nonexistent. Time and again, the agency failed or flatly refused to evaluate the cost-effectiveness of these devices. The only mention of airbags in the decision focused on Modified Standard 208 as written:

> Instead of installing air bags in approximately 60 percent of new cars [as had been anticipated in 1977], the manufacturers apparently planned to in-

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[35] *See* notes, 9, 12, 33 *supra*. Usage rates on GM's 1980 Chevette —which does not have an interlock—far exceeded the 24% rate that NHTSA concluded would make the standard economically justified. We emphasize, of course, that the agency has not yet performed this analysis.

> stall them in less than 1 percent of new cars. Thus, automatic belts would have been the predominant means of compliance, and installed in approximately 99% of new cars. Thus, the assumed life-saving potential of air bags would not have been realized.

46 Fed. Reg. at 53,421. It is obvious that airbags would be installed in 100% of new cars if NHTSA were to decide that no passive belts advanced the purpose of the safety standard and that airbags were the only way of complying with Modified Standard 208. NHTSA apparently did not consider this possibility. *See* RIA at IV-10, J.A. 66 (because airbags will be installed on a small scale, "the fatality reduction potential of air bags will not be considered in the main body of the analysis"); *id.* at IV-56, J.A. 112 ("Although benefits would be greater if [large cars were equipped with airbags], it does not now appear that this will happen"); *id.* at VI-19, J.A. 181 ("the Air cushion costs are not dealt with in this analysis as the domestic manufacturers have decided to use automatic safety belts rather than air bags to comply with the standard"); *id.* at XI-5, J.A. 265 ("The issue of air bags, constant and controversial as it is, is not in fact squarely before the Agency at this time").

NHTSA's failure to consider this obvious alternative is particularly striking in view of the history of the passive restraint standard. "To some, FMVSS 208 was always intended to be an air bag standard." RIA at XI-5, J.A. 265. The first notice of proposed rulemaking leading to the 1972 version of Standard 208 referred to "inflatable occupant restraint systems," 34 Fed. Reg. at 11,148 (1969), and passive belts were added thereafter. *See* pp. 7-8 *supra*. In *Chrysler Corp. v. Dep't of Transportation*, 472 F.2d at 664, the court suggested that the standard might be called "more descriptively, the Airbag Standard." Congress too has tended to consider airbags the central aspect of the passive restraint standard. *See*,

e.g., 120 CONG. REC. 35,637 (1974) (Representative Dingell) (observing "the desire of the Congress to review and, if appropriate, disapprove a standard imposing air bags on our constituents"); 124 CONG. REC. H 5309 (daily ed. June 12, 1978) (Representative Conte) ("The airbag does not go into effect until 1982"); H.R. REP. No. 145, 96th Cong., 1st Sess. 13-15 (1979) (supplemental views) (discussing only airbags). In 1977, when Senator Griffin added Senator Helms as a sponsor of S. Res. 31 to disapprove Modified Standard 208, the resolution was described as a measure to ban "the use of air bags in automobiles." 123 CONG. REC. 24,879 (1977). It is true that airbags also have been the most controversial aspect of the passive restraint standard. *See* pp. 43-47 *supra* (Senate but not House approved conference report that would have required automobile manufacturers to offer airbags on at least one car line). But this is all the more reason why NHTSA should at least have considered and evaluated the benefits and costs of a standard relying only on airbags before it could rationally rescind Modified Standard 208.

This is virtually self-evident. First, as NHTSA acknowledged in the RIA, the agency

> has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use, such that it could be considered an acceptable method of compliance with the mandates of the Act.

Id. at XI-4, J.A. 264. More important, airbags seem to have none of the problems that NHTSA identified in passive seatbelts. They are less obtrusive and therefore less likely to be disconnected because of "irrational fears" about being trapped. *See id.* at IX-18, J.A. 233. They cannot be analogized to manual seatbelts, and thus their rate of "use" is likely to be higher than that of passive belts. *See id.* at IV-9, 89-90, J.A. 65, 145-46. Moreover,

even when used, neither seatbelts nor airbags are completely effective in preventing deaths and injuries under all circumstances, but the "effectiveness" of airbags may be relatively higher. *See id.* at IV-9, J.A. 65.[36] Finally, whereas NHTSA emphasized its uncertainty that discounts in insurance premiums would "materialize on a general basis" under a passive belt regime, *see* 46 Fed. Reg. at 53,423, it observed that a number of insurance companies *already* offer a 30 percent discount on policies for vehicles equipped with airbags. RIA at V-1, J.A. 149.[37] Each of these points suggests that the benefits of an airbags-only standard would be significantly greater than the minimal benefits now predicted from Modified Standard 208 as written. Yet NHTSA made no attempt whatsoever to evaluate or even mention such a standard.

The agency did, of course, review the cost of airbags. As it observed, the unit cost of these devices is remarkably sensitive to economies of scale, ranging from as high

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[36] NHTSA found that manual and passive seatbelts, when used, had an effectiveness of roughly 50% for fatalities and 65% for serious injuries. RIA at IV-8, J.A. 64. When airbags are used in tandem with lap belts, their effectiveness is apparently slightly higher. As a result, NHTSA concluded that even if airbags were installed on only .5% of the 1984 model year fleet, this "results in a change in fatality reduction of 70 lives saved" over the predictions for 100% automatic belt installation. RIA at IV-88, IV-90, J.A. 144, 146.

[37] NHTSA supported its rescission of the standard by noting the reluctance of insurance companies to reduce insurance premiums on cars equipped with automatic belts until those belts had shown their effectiveness. 46 Fed. Reg. at 53,423 ("premium reductions generally are available only to owners of cars equipped with air bags, not automatic belts"). We fail to see how the fact that insurance companies set rates on the basis of experience can be used by NHTSA to evaluate the future effectiveness of a motor safety standard. Moreover, at least one intervenor intends to require the lowering of bodily injury premium levels based only on the introduction of passive restraints. Brief for Intervenor Superintendent of Insurance of the State of New York at 5-6.

as $1,200 when only 10,000 units are produced to as low as $200 when airbags are installed on a fleet-wide basis. *Id.* at VI-10, J.A. 172. Were the agency to analyze an airbags-only standard, the lower cost figures would obviously be the appropriate basis of its analysis.[38] We may therefore not decide on this record that NHTSA's failure to consider airbags alone was irrelevant; indeed, airbags may be significantly cost-effective.[39] That question is for NHTSA to decide, but it has not yet done so. The only reason that can even be *inferred* for NHTSA's silence on this point is that such a standard risks congressional disfavor under the legislative veto provisions of 15 U.S.C. § 1410b. The fact that Congress might veto an airbags-only standard is not a reason for ignoring such a standard; an agency cannot refuse to proceed with reasoned decisionmaking simply because Congress has explicitly stated an intention to review its conclusions at a later time.

3. *Other alternatives*

Other than promising to undertake a campaign to encourage voluntary seatbelt use, the kind of effort that has had dubious effectiveness in the past,[40] NHTSA con-

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[38] Such an analysis might also cause NHTSA to study the cost of airbags more closely. *See* RIA at VI-7, J.A. 169 (Talley Industries, Inc., price estimate of $212 per airbag, including $70 profit for dealer and manufacturer).

[39] *See* text at notes 7-10 *supra*. As late as 1981, NHTSA anticipated that airbags would be placed in "more than 60 percent of new cars." 46 Fed. Reg. at 53,420.

[40] *See, e.g.*, Arnould & Grabowski, *supra* note 33, at 45 ("past efforts along these lines have been extremely unsuccessful"); Comments of Insurance Institute for Highway Safety, May 26, 1981, J.A. 454-56) (poor results of past major promotional campaigns). Moreover, Administrator Peck promised that this campaign "will be undertaken regardless of the outcome of this proceeding" and "is not in any sense viewed as even related much less a substitute for the rulemaking process which is at work here." Transcript of NHTSA hearing, August 5-6, 1981, J.A. 1218-19, 1247A.

sidered no alternatives to the passive restraint standard.[41] Such alternatives abound, from speed controls that might prevent vehicles from obtaining freeway speeds unless seatbelts were fastened to continuous or flashing lights on dashboards. *See* Fed. Reg. 38,380 (Oct. 31, 1974) (recognizing that 1974 Amendment "leaves considerable regulatory discretion concerning warning systems" to replace continuous buzzers).

Although the agency clearly did not have an obligation to consider every such alternative in the course of rescinding Modified Standard 208,[42] the omission of one scheme stands out in particular. As discussed above, *see* pp. 10-11 *supra*, Secretary Coleman also decided that the passive restraint standard should be suspended, but he proposed a demonstration project involving up to 500,000 cars with passive restraints in order to "increase significantly the chances that passive restraints will ultimately prove acceptable [because] I am con-

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[41] The one possible exception is suggested by the comment that retention of Modified Standard 208 might lead to an adverse public reaction that could impair "the ability of States to pass mandatory seat belt use laws." RIA at ii, XI-12, J.A. 22, 272. This observation is ironic, to say the least, because the option of such laws "has consistently ranked last in several public opinion polls." Arnould & Grabowski, *supra* note 33, at 46; *see Pacific Legal Foundation v. Dep't of Transportation*, 593 F.2d at 1342 n.22 (both Adams and Coleman considered feasibility of mandatory seat belt laws and "concluded that such statutes could not be enacted in this country"). The explanation for the disfavor with which the American public regards such laws may have been given in note 33 *supra* (interlock requires affirmative action; passive restraints do not).

[42] *See, e.g., Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1171 (D.C. Cir. 1979) (agency head "was not required to meet each separate comment head on when issuing his determination following the comment period," where he did identify the "vital material questions raised during the proceedings and indicate the agency's response to these concerns"); *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968) ("We do not expect the agency to discuss every item of fact or opinion included in the submissions made to it in informal rulemaking").

vinced that their potential safety benefits warrant this action." Coleman Decision, J.A. 2074. When Secretary Adams countermanded this decision and issued the mandatory standard in 1977, the debate in Congress focused on the distinction between these two approaches. *See, e.g.*, 123 CONG. REC. 33,325 (1977) (Senator Cannon); *id.* at 33,327 (Senator Griffin); S. REP. NO. 481 (95th Cong., 1st Sess. 31 (1977) (Minority Views) ("the precise issue" is "not whether or not the development and use of air bags should be encouraged. (They should, and they would have been—much sooner, in fact—under former Secretary Coleman's voluntary program)"); H.R. REP. NO. 145, 96th Cong., 1st Sess. 14 (1979) (Supplemental Views) ("We must agree that the wiser and more sensible approach would be to reinstate the Coleman decision"). It is difficult to understand why NHTSA did not reinstate the Coleman decision because that approach is also not discussed in Notice 25. Here too, the agency's rescission of the safety standard without discussing or perhaps even considering obvious alternatives was arbitrary and capricious.

IV. THE NEED FOR A REMAND TO NHTSA

The foregoing analysis illustrates several ways in which NHTSA artificially narrowed its analysis of Modified Standard 208. Although that regulation is a performance standard, the agency offered no evidence that certain technology would fail to perform. More important, it then rescinded the standard without analyzing it in terms of technology that clearly would comply.

By any measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious. Despite carefully issuing notice on an array of possible changes to Modified Standard 208, NHTSA proceeded as though the only question were whether to implement or rescind the safety standard exactly as that standard was first written five years ago. "It is easy enough for an administrator to

ban everything." *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (FDA regulation concerning smoked whitefish overturned because agency failed to consider formulating rule "with specific parameters that applied to all species of fish"). But "an artificial narrowing of the scope of the regulatory problem is itself arbitrary and capricious and is ground for reversal." *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) (overturning regulation of cable television because record evidence failed to suggest existence of problem at which regulation was aimed). *See, e.g., Sabin v. Butz*, 515 F.2d 1061, 1069 (10th Cir. 1975) (summary judgment in favor of government on whether regulation was arbitrary was precluded by allegation that agency had failed to consider anticompetitive factors); *Pillai v. CAB*, 485 F.2d at 1027-30 (vacating order extending multilateral air carrier rates because agency considered only alternative to be open rates, and thus ignored bilateral negotiations and agency's suspension powers). These cases set aside regulations promulgated without consideration of obvious alternatives, but we see no reason why a different analysis should be applied here to the rescission of a regulation already promulgated. Either form of agency action may at times be irrational.

On balance, it is difficult to find anything positive to say about NHTSA's decisionmaking in this case. After conducting an elaborate quantitative analysis in a 280-page Regulatory Impact Analysis, NHTSA essentially rejected much of this analysis as "hypothetical":

> For purposes of this analysis only, the Agency has again adopted this approach in order to place hypothetical quantitative bounds on benefits and costs. The Agency, for reasons spelled out in detail in the Final Rule, does not accept these hypothetical bounds, and believes that it is not possible to predict with any accuracy what the usage rates of automatic belts would be.

RIA at XI-13, J.A. 273. *See id.* at IV-51, J.A. 107 (emphasizing that extrapolation from existing data "must be understood to be hypothetical"). In other words, the analysis to support Notice 25 has not yet been undertaken. Moreover, several of the explanations stated in Notice 25 fly directly in the face of the agency's own analysis. In stating that the standard would raise equity problems, for example, because current users of manual belts would "subsidize" the nonusers who "will generate all of the benefits that result directly and solely from this regulation," 46 Fed. Reg. at 53,425, NHTSA ignored the fact that high insurance savings could be realized *even by regular users of manual belts.* See RIA at V-1, J.A. 149.[43] It is difficult to avoid the conclusion that NHTSA's analysis in Notice 25 has been distorted by solicitude for the economically depressed automobile industry—which is not the agency's mandate—at the expense of consideration of traffic safety, which is.[44]

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[43] Because insurance companies are unable to tell which car owners consistently use their manual seatbelts, premium discounts are generally given only for vehicles equipped with airbags. *See* note 37 *supra*. *But see* transcript of *NHTSA* hearing, August 5-6, 1981, J.A. 1246 (Nationwide Mutual Insurance Companies has for 10 years offered increased insurance coverage at no additional cost to car owners who state that they use manual belts). Even current users of manual belts could benefit significantly from the lower insurance premiums that could follow implementation of the passive restraint standard. *See* RIA at V-9, J.A. 157 (at 60% usage rates, annual insurance discounts could be $30 per vehicle). Such discounts would cover the marginal cost of automatic belts after three years.

NHTSA also makes the dubious observation that although the Safety Act is "technology-forcing," *see* note 3 *supra*, "[i]t is difficult to conclude that the Vehicle Safety Act is, or in light of past experience could become, a 'people-forcing' statute." 46 Fed. Reg. at 43,426. The very concept of a passive restraint standard is that, unlike interlocks and mandatory seatbelt-use laws, it does *not* "force" safety action. *See* notes 33, 41 *supra*.

[44] *See* text at notes 6-7 *supra* (notice of rulemaking to rescind standard was based at least in part on economic problems of the

We do not hold, of course, that an agency charged with promulgating safety standards may never rescind those regulations once promulgated. But rescission must be supported by rational explanations, after a reasoned and good-faith effort to consider alternative means of advancing the agency's purpose. If Congress chooses, it has the authority to override Modified Standard 208 or any other regulation. *See, e.g.*, 15 U.S.C. § 1410 (exemption from motor vehicle safety standards for manufacturers of 10,000 cars or less for reasons of "substantial economic hardship"). But NHTSA may not confuse its role with that of Congress. Based on the record and the statements in Notice 25, we must conclude that NHTSA has acted capriciously, wearing blinders that prevented it from reasoned evaluation of methods to fulfill the purposes of the Safety Act.

Nature of the Remand

There are obvious problems associated with reversing NHTSA's action, however. Within hours of the issuance of Notice 25—and well before the notice's effective date—the automobile manufacturers began to dismantle their passive restraint programs, and now contend that it would require a minimum of twelve months "following the beginning of the first model year following announcement of the requirement" to restore these programs. MVMA Brief at 70 n.85.[45] Moreover, because of NHTSA's muddy

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automobile industry, and was announced by White House in *Actions to Help the U.S. Auto Industry*); RIA at II-9, J.A. 35 (applying standard to large cars first could have resulted in net income loss of $300 million and employment loss of 13,000 jobs). This observation may not apply to NHTSA's staff, however. *See* State Farm Brief at 19 n.27 (NHTSA Administrator Peck stated at October 23, 1981, press conference that "in some way or another, they all argued to retain the standard").

[45] Although Notice 25 was not effective until December 8, 1981, the automobile manufacturers acted on October 23 and 24. *See* State Farm Brief at 43 n.56 (citing affidavits attached to MVMA Opposition to Stay in November, 1981); NAII Brief at 63 (same).

reasoning in Notice 25, manufacturers would justifiably feel uncertain about the technology that satisfies the performance requirements of Modified Standard 208. *See id.* at 69 n.84. NHTSA has yet to make the case that detachable belts would not comply, although it could make that finding or even require compliance by airbags only. We must therefore decline the suggestions of petitioners that the standard take full effect by September 1983, State Farm Brief at 21, or by September 1982, NAII Brief at 64.

At the same time, we should not simply remand this petition to the agency so that recalcitrance might succeed where rational decisionmaking might not. The implementation of a passive restraint standard has already been delayed without acceptable reasons, perhaps unconscionably so. Our decision does not foreclose rescission, but requires simply that the agency analyze obvious technological alternatives for compliance before doing so. We therefore remand to NHTSA to recommend to us 30 days from today a feasible schedule for completing analysis of these questions. If technological means are found that conform to the performance requirements of the standard such that its safety benefits are economically justified, NHTSA is further instructed to prepare a practical schedule for the implementation of a passive restraint standard.[46] Our order does not, of course, foreclose a reasoned decision by NHTSA that the standard should be suspended or delayed for appropriate reasons, or impede any action that Congress might take to resolve these issues.

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[46] *See MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 346 (D.C. Cir. 1980) (ordering same procedure). As in that case, any party to the proceedings before NHTSA or now before the court shall file with the court any comments on NHTSA's proposed schedule within fifteen days after that schedule is filed with the court by NHTSA. Within fifteen additional days, NHTSA may reply to any of the comments. The court will then either approve, reject, or appropriately modify the schedule, or make such further orders as necessary.

NHTSA is correct in expressing concern about negative public reaction to "an expensive example of ineffective regulation." 46 Fed. Reg. at 53,424. There is no basis on the record before us, however, for concluding that Modified Standard 208 is such a regulation. More important, it is erroneous to believe that "ineffective regulation" occurs only when government acts affirmatively. By rescinding the passive restraint standard without legal justification, NHTSA's arbitrary action presents a paradigm of ineffective regulation. Notice 25 has wasted administrative and judicial resources, and has possibly delayed without justification a safety standard that may be, "from an economic point of view, as important as any environmental, health, or safety rule now on the books."[47] At present rates, 1 in every 60 children born today is expected to die in an automobile accident, and 2 out of every 3 will suffer injuries in a crash. *See* 126 CONG REC. S 13,503 (daily ed. Sept. 25, 1980) (Senator Warner). These figures may be low, for NHTSA concedes that the problem at which the passive restraint standard was aimed has become more urgent in recent years. *See* p. 15 *supra*. But the agency concludes Notice 25 by observing:

> After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits.

46 Fed. Reg. at 53,426. NHTSA may yet conduct the reasoned decisionmaking that can support the rescission of the passive restraint standard, but it may not reject twelve years of preparation for such a standard until it does so. The agency's action here thus represents "an expensive example of ineffective regulation" of the worst kind.

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[47] Comment of William D. Nordhaus, John Musser Professor of Economics at Yale University, May 26, 1981, J.A. 511, 514.

CONCLUSION

NHTSA began this rulemaking because a number of factors had changed since Modified Standard 208 was approved by Congress in 1977. These changed factors—higher gasoline prices, smaller cars, an ailing automobile industry, and the methods of compliance being pursued by that industry—may fully justify reassessing, modifying, and even deferring the effective date of the regulation, decisions that are not before us here. There has been no showing, however, that these changes justify rescinding the standard outright. The explanations put forward in Notice 25 are arbitrary in their failure to address obviously relevant considerations. The rescission of Modified Standard 208 is reversed.

We recognize that sensitive issues are raised in this case. An administrative agency may well require less basis for its decision not to pursue a particular policy at a particular time than when it decides to act affirmatively. But agencies may not ignore the mandate they have received from Congress, and reverse course without a reasoned or rational foundation for doing so. In this regard, we emphasize that courts, administrative agencies, and Congress are partners, not adversaries. Courts do not substitute judgment for that of the agency, but ensure that agencies exercise their judgment only in accordance with the will of Congress.

NHTSA's rescission of Modified Standard 208 cannot be supported on this record. The agency has 30 days in which to submit a schedule for resolving the questions raised in this opinion, leading either to the rescission or suspension of the standard or to a judicially approved schedule for the effective implementation of that standard or an amended standard. If NHTSA finds nonarbitrary reasons for rescinding the standard, of course, its action will be affirmed. Absent such reasons, or intervening action by Congress, NHTSA may not arbitrarily veer from the course that Congress has set.

It is so ordered.

EDWARDS, *Circuit Judge*, concurring: Although I agree with the conclusion in part III of the majority opinion, that "[t]he rescission of Modified Standard 208 on the grounds stated by NHTSA was arbitrary and illogical," maj. op. at 50, I rely principally on the reasons indicated in part III-A. Certain of the observations made in part III-B of the majority opinion appear to be irrefutable, but I do not accept them as a basis for decision in this case. With this one exception, I fully concur in the excellent opinion of Judge Mikva.

By way of emphasis, I think it important to highlight a theme that is implicit throughout the majority opinion. This case involves highly controversial issues that are seen to be critically important to various and competing interest groups. The role of the court is not to write or rewrite Federal Motor Vehicle Safety Standards, or to support a particular interest group, or to weigh alternative solutions to economic problems, or to respond to the political climate of the day. The role of the court—plain and simple—is to enforce the mandate of Congress as expressed in the National Traffic and Motor Vehicle Safety Act and, thus, to determine whether the action of NHTSA reflects "reasoned decisionmaking that is the essence of lawful administrative action." Maj. op. at 5. This judicial role does not change when the court, as here, is confronted with a hotly contested and highly controversial case. The court, thus, does not become a rubberstamp for lawless agency action merely because the questions posed are difficult or sensitive.

As Judge Mikva has so ably indicated in his exhaustive majority opinion, the decision of NHTSA is long on words and short on reasoned decisionmaking. Indeed, the agency decision appears to be nothing more than a determined effort to achieve a particular result without

regard to the facts at hand. Plainly, this is not reasoned decisionmaking, and it cannot be sanctioned by this court.

We express no judgment on the proper outcome of this case and, therefore, we do not seek to substitute our judgment for that of the agency. Rather, as is our responsibility, we reverse here to require the agency to act in accordance with the will of Congress and pursuant to reasoned decisionmaking.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION,
DREW LEWIS, as SECRETARY,
NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
AUTOMOBILE IMPORTERS OF AMERICA, INC.,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS,
AUTOMOBILE OWNERS ACTION COUNCIL, and
EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC.,
CONSUMER ALERT and PACIFIC LEGAL FOUNDATION,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
Intervenors

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

It is ORDERED, by the Court, *sua sponte*, that the schedule for resolving questions, which the Court's opinion herein this date directs respondent Administration to file (see page 76 of slip opinion), shall be filed and served upon counsel of record on or before July 1, 1982.

It is FURTHER ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed June 1, 1982]

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF STATE OF NEW YORK, ET AL.,
Intervenors

And Consolidated Case No. 81-2221

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of respondent's (DOT) filing in response to the Court's order entered on June 1, 1982, the comments of petitioners and intervenors in response thereto, and for the reasons set forth in the accompanying memorandum, it is

ORDERED, by the Court, *sua sponte*, that the compliance dates of Federal Motor Vehicle Safety Standard 208, the passive restraint standard, are stayed until September 1, 1983 (Model Year 1984). And it is

FURTHER ORDERED, by the Court, *sua sponte*, that respondent DOT has until October 1, 1982, to advise the Court whether such a compliance date is achievable, or whether a longer period is required, setting forth adequate reasons therefor.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed August 4, 1982]

MEMORANDUM

On June 1, 1982, the Court issued a decision holding that Federal Motor Vehicle Safety Standard 208 had been unlawfully rescinded. The effect of the Court's decision was to restore Standard 208 to the status quo ante litem, as Standard 208 stood on December 7, 1981.

The Court's opinion recognized that DOT had misgivings about particular technology that might be used to comply with Standard 208, specifically the so-called detachable passive seatbelt. Despite DOT's failure in Notice 25 to provide a rational basis for the conclusion that detachable passive seatbelts would not advance the goals of Standard 208, the Court therefore suggested that DOT prepare a schedule for addressing this and other questions raised in the Court's opinion. The Court's opinion also emphasized that even if DOT were lawfully to conclude that detachable passive seatbelts did not advance the goals of Standard 208, additional analysis would still be required before the agency could rescind Standard 208 altogether.

Until that analysis is performed by the agency, however, Standard 208 remains fully in force. The safety standard that was unlawfully rescinded by DOT would have required compliance for large and mid-size automobiles manufactured after September 1, 1982, and for small automobiles manufactured after September 1, 1983. Because of the obvious difficulties created by DOT's unlawful rescission, and in order to accommodate as fully as possible the policies expressed in the statutory scheme as a whole, *see* slip op. at 42 (congressional concern that standard apply to all model sizes simultaneously), the Court in the exercise of its equity powers has stayed the compliance dates for large and mid-size cars until September 1, 1983. DOT has more than 45 days to advise the Court whether the revised compliance dates are achievable. The reporting date of October 1, 1982, does not af-

fect the requirement that automobile makers comply with the standard by September 1, 1983.

The Notice of Proposed Supplemental Rulemaking filed by DOT in response to the Court's order of June 1, 1982, is not inconsistent with the Court's order; at the same time, no party benefits from open-ended DOT decisionmaking, and some dates must be fixed. DOT is free to request additional comments from interested parties, to conduct further regulatory impact analyses, or even to terminate the rulemaking entirely, but additional rulemaking is not required before Standard 208 takes effect. The agency is free to issue orders rescinding or modifying [1] the passive restraint standard, subject to judicial review. The agency is also free, of course, to take its views to Congress, as long as it does not attempt to change the law by administrative fiat.

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[1] Examples of possible modifications include elimination of compliance by means of detachable passive seatbelts, or deletion from the standard of the requirement of passive protection for front center seating positions. *See* slip op. at 56 n.32. Modifications must of course be supported by the reasoned decisionmaking required under law.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

SUPERINTENDENT of INSURANCE of STATE of NEW YORK, ET AL.,
Intervenors

And Consolidated Case No. 81-2221

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of respondent's (DOT) and intervenors' (Consumer Alert, et al.) motions for extension of time in which to file petitions for rehearing and/or rehearing en banc of the Court's decision issued June 1,

1982, of intervenors' (MVMA, et al.) responses, and petitioners' (State Farm, et al.) oppositions in response thereto, and it appearing that the motions for extension of time fail to show the "good cause" required to justify such extension, and for the reasons set forth in the accompanying memorandum, it is

ORDERED, by the Court, that the motions for extension of time in which to file petitions for rehearing and/or rehearing en banc are denied. And it is

FURTHER ORDERED, by the Court, that the period for filing timely petitions for rehearing and/or rehearing en banc having expired, the mandate in the above-captioned case be issued accordingly.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

[Filed August 4, 1982]

MEMORANDUM

The Court's decision in the above-captioned case was issued on June 1, 1982, thereby giving the Department of Transportation (DOT) until July 16 to file petitions for rehearing and/or rehearing en banc pursuant to Local Rule 14(a)(1). On July 12, 1982, only four days before this 45-day period was to expire, DOT moved for an extension of time in which to file the aforesaid petitions. The sole basis offered by DOT for its motion concerned the Court's order that the agency propose a schedule for addressing certain questions raised by the Court's decision. DOT suggested: "Until this Court acts on the proposed schedule and the comments filed with respect to that schedule, the extent of judicially imposed obligations on Respondent is unclear." DOT Motion for Extension of Time, July 12, 1982, at 2.

The reason given by DOT does not constitute the "good cause" required by Fed. R. App. P. 26(b) for enlarging the time for filing petitions for rehearing. There is no logical connection between the legal correctness of the Court's decision, that Federal Motor Vehicle Safety Standard 208 was unlawfully rescinded, and "the extent of judicially imposed obligations" now required to ensure that respondent acts in accordance with legislation passed by Congress. The period for filing timely petitions for rehearing expired on July 16, 1982; the mandate of the Court will therefore issue accordingly. This does not, of course, preclude respondent or intervenors from seeking writs of certiorari from the Supreme Court.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN and LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, as SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, and RAYMOND A. PECK, JR., as ADMINISTRATOR,
Respondents

And Consolidated Case No. 81-2221

Before: WALD, MIKVA and EDWARDS, *Circuit Judges*

ORDER

Upon consideration of the motions for stay filed in the above-captioned cases, and of the oppositions and the replies thereto, it is

ORDERED, by the Court, that the aforesaid motions are denied. *Virginia Petroleum Jobbers Association* v. *FPC*, 259 F.2d 921 (D.C. Cir. 1958). It is

FURTHER ORDERED, by the Court, that the briefing and hearing of these cases on the merits shall be expe-

dited; these cases shall be scheduled for argument on the February-March calendar, February 11-March 3, 1982. A briefing schedule shall be established by later order of this Court. It is

FURTHER ORDERED by the Court that the motion of petitioner State Farm Mutual Automobile Insurance Company for oral argument on the motions for stay is denied.

The parties are instructed to address in their briefs the amount of time that will be required by the agency and by the affected automobile manufacturers to take appropriate action in the event that this Court invalidates in whole or in part the agency's rescission order of October 29, 1981.

Per Curiam

Circuit Judge Wald did not participate in the foregoing order.

[Filed December 7, 1981]

APPENDIX E

[46 Fed. Reg. 53419 (October 29, 1981)]

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 74-14; Notice 25]

Federal Motor Vehicle Safety Standards;
Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration, Department of Transportation.

ACTION: Final rule.

SUMMARY: The purpose of this notice is to amend Federal Motor Vehicle Safety Standard No. 208, Occupant Crash Protection, to rescind the requirements for installation of automatic restraints in the front seating positions of passenger cars. Those requirements were scheduled to become effective for large and mid-size cars on September 1, 1982, and for small cars on September 1, 1983.

The automatic restraint requirements are being rescinded because of uncertainty about the public acceptability and probable usage rate of the type of automatic restraint which the car manufacturers planned to make available to most new car buyers. This uncertainty and the relatively substantial cost of automatic restraints preclude the agency from determining that the standard is at this time reasonable and practicable. The reasonableness of the automatic restraint requirements is further called into question by the fact that all new car buyers would be required to pay for automatic belt systems that may induce only a few additional people to take advantage of the benefits of occupant restraints.

The agency is also seriously concerned about the possibility that adverse public reaction to the cost and presence of automatic restraints could have a significant adverse

effect on present and future public acceptance of highway safety efforts.

Under the amended standard, car manufacturers will continue to have the current option of providing either automatic or manual occupant restraints.

DATES: The rescission of the automatic restraint requirements of Standard No. 208 is effective December 8, 1981. Any petitions for reconsideration must be received by the agency not later than December 3, 1981.

ADDRESS: Any petitions for reconsideration should refer to the docket number and notice number of this notice and be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Finkelstein, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810).

SUPPLEMENTARY INFORMATION: On April 9, 1981, the Department of Transportation published a notice of proposed rulemaking (NPRM) setting forth alternative amendments to the automatic restraint requirements of Standard No. 208 (46 FR 21205). The purpose of proposing the alternatives was to ensure that Standard No. 208 reflects the changes in circumstances since the automatic restraint requirements were issued (42 FR 34289; July 5, 1977) and to ensure that the standard meets the requirements of the National Traffic and Motor Vehicle Safety Act of 1966 and Executive Order 12291, "Federal Regulations" (February 17, 1981).

Background and NPRM

The automatic restraint requirements were adopted in 1977 in response to the high number of passenger car occupants killed annually in crashes and to the persistent low usage rate of manual belts. The manual belt is the

type of belt which is found in most cars today and which the occupant must place around himself or herself and buckle in order to gain its protection. Then, as now, there were two types of automatic restraints, i.e., restraints that require no action by vehicle occupants, such as buckling a belt, in order to be effective. One type is the air cushion restraint (air bag) and the other is the automatic belt (a belt which automatically envelops an occupant when the occupant enters a vehicle and closes the door).

In view of the greater experience with air bags in large cars and to spread out capital investments, the Department established a large-to-small car compliance schedule. Under that schedule, large cars were required to begin compliance on September 1, 1981, mid-size cars on September 1, 1982, and small cars on September 1, 1983.

On April 6, 1981, after providing notice and opportunity for comment, the Department delayed the compliance date for large cars from September 1, 1981, to September 1, 1982. As explained in the April 6, final rule, that delay was adopted

> . . . because of the effects of implementation in model year 1982 on large car manufacturers, because of the added significance which those effects assume due to the change in economic circumstances since the schedule was adopted in 1977, and because of the undermining by subsequent events of the rationale underlying the original phase-in schedule.

Simultaneous with publishing the one-year delay in the effective date for large cars, the Department also issued a proposal for making further changes in the automatic restraint requirements. This action was taken in response to a variety of factors that raised questions whether the automatic restraint requirements represented the most reasonable and effective approach to the problem of low usage of safety belts. Among these factors were the un-

certainty about public acceptability of automatic restraints in view of the absence of any significant choice between automatic belts and air bags and the nature of the automatic belt designs planned by the car manufacturers, the consequent uncertainties about the rate of usage of automatic restraints, and the substantial costs of air bags even if produced in large volumes.

The three principal proposals were reversal of phase-in sequence, simultaneous compliance, and rescission. The reversal proposal would have changed the large-to-small car order of compliance to a requirement that small cars commence compliance on September 1, 1982, mid-size cars on September 1, 1983, and large cars on September 1, 1984. The proposal for simultaneous compliance would have required all size classes to begin compliance on the same date, March 1, 1983. The rescission proposal would have retained the manufacturers' current option of equipping their cars with either manual or automatic restraints.

In addition, the Department proposed that, under both the first and second alternatives, the automatic restraint requirements be amended so that such restraints would not be required in the front center seating position.

Following the close of the period for written comments on the April NPRM, NHTSA decided, in its discretion, to hold a public meeting on the alternatives. The purpose of the meeting was to permit interested parties to present their views and arguments orally before the Administrator and ensure that all available data were submitted to the agency. The notice announcing the meeting indicated that participants at the hearing would be permitted to supplement their previous comments. The notice also urged participants to consider the issues raised in former Secretary Coleman's June 14, 1976 proposal regarding occupant restraints and in former Secretary Adams' March 24, 1977 proposal regarding automatic restraints.

Rationale for Agency Decision

The decision to rescind the automatic restraint requirements was difficult for the agency to make. NHTSA has long pursued the goal of achieving substantial increases in the usage of safety belts and other types of occupant restraints. Former Secretary Adams clearly believed that he had ensured the achievement of that goal in July 1977 when he promulgated the automatic restraint requirements. Now that goal appears as elusive as ever. Instead of being equipped with automatic restraints that will protect substantially greater numbers of persons than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts. The usage of those automatic belts might, therefore, have been only slightly higher than that of manual belts. While most of the anticipated benefits have virtually disappeared, the costs have not. Vehicle price increases would have amounted to approximately $1 billion per year.

This turn of events may in part reflect the failure of the Department in the years following 1977 to conduct a long term effort to educate the public about the various types of restraints and the need to use them. The need for such an undertaking was seen by former Secretary Coleman in announcing his decision in 1976 to conduct an automatic restraint demonstration project prior to deciding whether to mandate automatic restraints. His instruction that NHTSA undertake significant new steps to promote safety belt usage was never effectively carried out. The result of such an effort could have been that a substantial portion of the public would have been receptive to a variety of automatic restraint designs. As a result of concern over public acceptance, manufacturers have designed their automatic restraints to avoid creating a significant adverse reaction. Unfortunately, the elements of design intended to minimize adverse reaction would also minimize the previously anticipated increases in belt

usage and safety benefits of requiring new cars to have automatic restraints instead of manual belts.

The uncertainty regarding the usage of the predominant type of planned automatic restraint has profound implications for the determinations which NHTSA must make regarding a standard under the National Traffic and Motor Vehicle Safety Act. NHTSA has a duty under the Vehicle Safety Act and E.O. 12291 to review the automatic restraint requirements in light of changing events and to ensure that the requirements continue to meet the criteria which each Federal Motor Vehicle Safety Standard must satisfy. If the criteria cannot be satisfied, the agency must make whatever changes in the standard are warranted. The agency must also have the flexibility to modify its standards and programs in its efforts to find effective methods for accomplishing its safety mission.

The agency believes that the post-1977 events have rendered it incapable of finding now, as it was able to do in 1977, that the automatic restraint requirements would meet all of the applicable criteria in the Vehicle Safety Act. Section 103(a) of the Vehicle Safety Act requires that each Federal Motor Vehicle Safety Standard meet the need for safety and be practicable and objective. Each standard must also be reasonable, practicable and appropriate for each type of vehicle or equipment to which it applies (Section 103(f)(3)). To meet the need for safety, a standard must be reasonably likely to reduce deaths and injuries. To be found practicable, the agency must conclude that the public will in fact avail themselves of the safety devices installed pursuant to the standard (*Pacific Legal Foundation v. Department of Transportation*, 593 F.2d 1338, at 1345-6 (D.C. Cir. 1979)). To be reasonable and practicable, a standard must be economically and technologically feasible, and the costs of implementation must be reasonable. (S. Rep. No. 1301, 89th Cong., 2d Sess. 6 (1966).)

In reaching the decision announced by this notice, NHTSA has reviewed the enormous record compiled by this agency over the past decade on automatic restraints. Particular attention was paid to the information and issues relating to the notices which the Agency or Department has issued regarding automatic restraints since 1976. All comments submitted in response to the April 1981 proposal by proponents and opponents of the automatic restraint requirements have been thoroughly considered. A summary of the major comments is included as an appendix to this notice. The agency's analysis of those comments may be found in this notice and the final regulatory impact analysis. A copy of the analysis has been placed in the public docket.

Usage of automatic restraints and safety benefits. As in the case of the comments submitted concerning the one-year delay in automatic restraint requirements for large cars, the commenters on the April 1981 proposal expressed sharply divergent views and arguments and reached widely differing conclusions concerning the likely usage rates and benefits of the automatic restraints planned for installation in response to the automatic restraint requirements. The wide distance between the positions of the proponents and opponents of these requirements stems primarily from the lack of any directly relevant data on the most important issue, i.e., the public reaction to and usage rate of detachable automatic belts. These disagreements once again demonstrate the difficulty in reaching reliable conclusions due to the uncertainty created by the lack of adequate data.

In issuing the automatic restraint requirements in 1977, NHTSA assumed that the implementation of those requirements would produce substantial benefits. According to the analysis which NHTSA performed in that year, automatic restraints were expected to prevent 9,000 deaths and 65,000 serious injuries once all cars on the road were equipped with those devices. That prediction was premised

on several critical assumptions. Most important among the assumptions were those concerning the safety benefits of automatic restraints—reductions in death and injury—which in turn are a function of the types of automatic restraints to be placed in each year's production of new cars.

The agency assumed that the combination of air bags and lap belts would be approximately 66 percent effective in preventing fatalities and that automatic belts would have a 50% level of effectiveness. The agency assumed also that air bags would be placed in more than 60 percent of new cars and that automatic belts would be placed in the remaining approximately 40 percent. The agency's analysis predicted that air bags would provide protection in virtually all crashes of sufficient severity to cause deployment of the air bags. It was further assumed that the automatic belts would be used by 60 to 70 percent of the occupants of those cars.

As to public reaction, the agency anticipated that the public would, as a whole, accept automatic restraints because it could choose between the two types of those restraints. Those not wanting automatic belts would select an air bag. Partly as a function of the expected large volume of air bag installation, the agency projected that the cost of air bags would be only slightly more than $100 (in 1977 dollars) more than manual belts.

As part of its efforts to monitor and facilitate implementation of the automatic restraint requirements, the agency continued its gathering of data about the use and effectiveness of air bags and of automatic belts with use-inducing features, the only type of automatic belt available to the public. With respect to automatic belts, this effort was carried out through a contract with Opinion Research Corporation. Under that contract, observations were made of seat belt usage during the two-year period beginning November 1977. These observations provided data on usage of manual and automatic belts in model year

1975-79 VW Rabbits and of manual belts in model year 1978-79 GM Chevettes. As a result of voluntary decisions by VW and GM, a number of the Rabbits and Chevettes were equipped with automatic belts. The observation data showed usage rates of about 36 percent for manual belts and about 81 percent for automatic belts in the Rabbits. The observed rate of manual belt usage in Chevettes was 11 percent. There were insufficient numbers of model year 1978-79 Chevettes equipped with automatic belts to develop reliable usage figures.

Several telephone surveys were also made under contract with Opinion Research. The first survey involved owners of model year 1979 VW Rabbits and GM Chevettes equipped with automatic belts and was conducted during 1979. This survey showed that 89 percent of Rabbit owners and 72 percent of Chevette owners said that they used their automatic belts. A second survey was conducted in late 1979 and early 1980. It covered owners of model year 1980 Rabbits and Chevettes. The usage rates found by the second survey were almost identical to those in the first survey.

Now, however, the validity of the benefit predictions in 1977 and the relevancy of the extensive data gathered by NHTSA on air bags and on automatic belts with use-inducing features have been substantially if not wholly undermined by drastic changes in the types of automatic restraints that would have been installed under the automatic restraint requirements. Instead of installing air bags in approximately 60 percent of new cars, the manufacturers apparently planned to install them in less than 1 percent of new cars. Thus, automatic belts would have been the predominant means of compliance, and installed in approximately 99% of new cars. Thus, the assumed life-saving potential of air bags would not have been realized.

Manufacturers have stated that they chose belt systems for compliance because of the competitive disadvantage of

offering the relatively expensive, inadequately understood air bag when other manufacturers would have been providing automatic belts. These explanations seem credible.

The other drastic change concerns the type of automatic belt to be installed. Although some aspects of the car manufacturers' automatic belt plans are still tentative, it now appears reasonably certain that if the automatic restraint requirements were implemented, the overwhelming majority of new cars would be equipped with automatic belts that are detachable, unlike the automatic belts in Rabbits and Chevettes. Most planned automatic belts would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently.

Again, this design choice would appear to have arisen out of concern that without such features emergency exit could be inhibited, and, in part as a result of a perception of this fact, public refusal to accept new designs would be widespread. The agency shares this concern, and has since 1977 required that all such belts provide for emergency exit. Agency concerns on this point have been validated by recent related attitudinal research discussed below.

In its final rule delaying the initial effective date of the automatic restraint requirements, the April 1981 proposal and the associated documents analyzing the impacts of those actions, NHTSA expressly confronted the lack of usage data directly relevant to the type of automatic belts now planned to be installed in most new cars. The agency stated that there were several reasons why the available data was of limited utility in attempting to make any reliable predictions about the usage of easily detachable automatic belts. The most important reason, which has already been noted, is that the predominant type of planned automatic belt would not have had features to ensure that these belts are not detached.

Second, all of the available data relate to only two subcompacts, the Rabbit and the Chevette. Due to a combina-

tion of owner demographics and a correlation between driver perception of risk and the size of the car being driven, belt usage rates are typically higher in small cars than in larger ones. Therefore, the usage rates for the two subcompacts cannot simply be adopted as the usage rates for automatic belts in all car size classes.

Third, most of the Rabbit and Chevette owners knew that their new car would come with an automatic belt and had it demonstrated for them, even if many state that they did not consciously choose that type of belt. Having voluntarily invested in automatic restraints, they are more likely to use those restraints than someone who is compelled to buy them.

The significance of the fundamental difference between the nondetachable and detachable automatic belt bears further discussion. The Rabbit automatic belts are, as a practical matter, not permanently detachable since they are equipped with an ignition interlock. If the belt is disconnected, the interlock prevents the starting of the car. Each successive use would therefore require reconnection before engine start. The Chevette automatic belts also were initially equipped with an ignition interlock. Beginning in model year 1980, the Chevette belts were made both practically and literally nondetachable. They consist of a continuous, nondetachable shoulder belt. Additional webbing can be played out to produce slack in the belt; however, the belt remains attached at both ends.

By contrast, the automatic belts now planned for most cars do not have any effect on the starting of the cars and are easily detachable. Some belt designs may be detached and permanently stowed as readily as the current manual lap and shoulder belts. Once a detachable automatic belt is detached, it becomes identical to a manual belt. Contrary to assertions of some supporters of the standard, its use thereafter requires the same type of affirmative action that is the stumbling block to obtaining high usage levels of manual belts. If the car owners perceive the belts as

simply a different configuration of the current manual belts, this stumbling block is likely to remain. They may treat the belt as a manual one and thus never develop the habit of simply leaving the belt attached so that it can act as an automatic belt.

The agency recognizes the possibility that the exposure of some new car purchasers to attached automatic belts may convert some previously occasional users of manual belts to full time belt users. Present attitudinal survey data clearly establish the existence of a population of such occupants who could be influenced by some external factor to convert to relatively constant users. However, the agency believes that many purchasers of new cars having detachable automatic belts would not experience the potential use-inducing character of attached automatic belts unless they had taken the initiative themselves to attach the belts.

Thus, the change in car manufacturers' plans has left the agency without any factual basis for reliably predicting the likely usage increases due to detachable automatic belts, or for even predicting the likelihood of any increase at all. The only tentative conclusion that can be drawn from available data is that the installation of *nondetachable* automatic belts in other subcompacts could result in usage rates near those found in Rabbits and Chevettes. Even that use of the Rabbit and Chevette data may be questionable, however, given the element of voluntarism in the purchase of automatic belts by many of the Rabbit and Chevette owners. Thus, the data on automatic belt use in Rabbits and Chevettes may do little more than confirm the lesson of the model year 1974-75 cars equipped with manual belts and ignition interlocks, i.e., that the addition to a belt system of a feature that makes the belt nondetachable or necessitates its attachment before a car can be started can substantially increase the rate of belt usage.

In estimating automatic belt usage rates for the purposes of the April final rule and proposal, the agency recognized the substantial uncertainty regarding the effects of easily detachable automatic belts on belt usage. NHTSA attempted to compensate for the lack of directly relevant data by using two different techniques to predict a potential range of usage.

One technique was to assume a consistent multiplier effect, whereby belt usage in cars of all size classes would be assumed to be more than slightly double as it had in Rabbits. A doubling of the current 10-11 percent manual belt usage rate projected over the general car fleet would mean a 22 percent rate could be achieved with the installation of automatic belts. The other technique was to assume that there would be a consistent additive effect, whereby the same absolute percentage point increase in belt usage would occur as there had been in the case with Rabbits. Use of this method would result in a predicted 50 percentage point increase in belt usage, over the entire fleet, from the current 10-11 percent to approximately 60 percent.

The agency used the results of these two techniques in an attempt to construct a range of possible increases in belt usage. Thus, a range of 15 to 60 percent was used in both the final regulatory impact analysis for the April rulemaking to defer the effective date for one year and the preliminary analysis for the current action. The figure of 15 percent was derived by doubling the observed 7 percent usage levels in the large type cars affected by the deferral. A figure of 22 percent would have been more appropriate as the low end of the range for the current action, since it would represent a doubling of the current usage rate of the car fleet as a whole. This latter figure has been used in addressing this question in the current final regulatory analysis.

Although the agency had no definitive way of resolving the uncertainty about the usage of detachable automatic

belts, the agency estimated that belt usage with automatic belts would most likely fall near the lower end of either range. This estimate was based on a variety of factors. Most relate to the previously discussed limitations in the relevancy of the observations and surveys of Rabbit and Chevette owners. In addition, those data were on their face inconsistent with data regarding automatic belt usage in crashes involving Rabbits. Those crash data indicated a usage rate of 55-57 percent instead of the better than 80 percent rate indicated by the observation study and telephone surveys.

Thus, the agency made the preliminary judgment in its impact analyses that the switch from manual belts to detachable automatic belts could approximately double belt usage. However, the April 1981 final rule noted that the actual belt usage might be lower, even substantially so. With respect to cars with current low usage rates, that notice stated that the usage rate of detachable automatic belts might only approach levels similar to those currently achieved with manual belts.

The commenters on the April 1981 NPRM did not present any new factual data that could have reduced the substantial uncertainty confronting the agency. Instead, the commenters relied on the same data examined by the agency in its impact analyses.

The commenters were sharply divided on the question of usages rates. Proponents of the automatic restraint requirements did not in their analyses address the significance of the use-inducing nature of the nondetachable automatic belts in the Rabbits and Chevettes or the demographic factors relating to those car purchasers. Instead, they asserted that the usage rates achieved in Rabbits and Chevettes would, with slight adjustments, also be achieved in other car size classes. In reaching this conclusion, they asserted that the usage rate increases of automatic belts shown by Rabbit and Chevette owners were the same regardless of whether the automatic belts

were purchased knowingly or unknowingly. There was an exception to this pattern of comment among the proponents. One public spokesperson for an interest group acknowledged that automatic belts could be designed in a way that they so closely resembled manual belts that their usage rates would be the same.

Opponents of the automatic restraint requirements, relying on the similarity of detachable automatic belts to manual belts, predicted that the automatic belts would not have any substantial effect on belt usage. The opponents of the requirements also dismissed the experience of the Rabbit and Chevette owners on the grounds that the automatic belts in those cars had been voluntarily purchased and were nondetachable.

While the public comments did not provide the agency with any different or more certain basis for estimating belt usage than it already had, they did induce the agency to reexamine its assumption about the possible automatic belt usage rates. Although it is nearly impossible to sort out with precision the individual contributions made by nondetachability, interlocks, car size, demographics and other factors, NHTSA believes that the usage of automatic belts in Rabbits and Chevettes would have been substantially lower if the automatic belts in those cars were not equipped with a use-inducing device inhibiting detachment.

In the agency's judgment, there is a reasonable basis for believing that most of the increase in automatic belt Rabbits and Chevettes is due to the nondetachability feature, whether an interlock or other design feature, of their belt systems. Necessitating the attachment of belts by the addition of interlocks to 1974-75 cars resulted in an increase in manual belt usage by as much as 40 percent in cars subject to that requirement. A similar effect in the case of the Rabbit would account for four-fifths of the increase observed in the automatic belt vehicles. A significant portion of the remaining increase could in fact

be attributable to the fact many owners of automatic belt Rabbits and Chevettes knowingly and voluntarily bought the automatic belts. By the principle of self-selection, these people would be more inclined to use their belts than the purchasers of 1974-75 Rabbits who did not have any choice regarding the purchase of a manual belt equipped with an interlock. This factor would not, of course, be present in the fleet subject to the standard.

The most appropriate way of accounting for the detachability problem and other limitations on the validity of that Rabbit and Chevette data would be to recognize that the levels of usage resulting from both the point estimates are based on uncertain conclusion and adjust each appropriately. The agency's estimate in the final regulatory impact analysis for the April 1981 final rule that usage would likely fall near the lower end of the range had the effect of substantially adjusting downward the usage rate (60 percent) produced by the technique relying on the absolute percentage point increase (50 percentage points) in belt usage in automatic belt Rabbits and Chevettes. A similar adjustment could also be made in the usage rate (15 percent) indicated by the multiplier technique.

Throughout these sequential analyses, the agency has examined the extremely sparse factual data, applied those factors which are known to externally affect usage rates, and defined for analytical purposes the magnitude of potential safety effects. Aside from the initial data points, all such analyses in all cases necessarily involve exercises of discretion and informed judgment. Resultant conclusions are indications of probable usage which always have been and always must be relied upon by the agency in the absence of additional objective data.

The agency believes that the results produced by both techniques must be adjusted to account for the effects of detachability and the other factors affecting usage rates. Therefore, as the April 1981 final rule recognized, the

incremental usage attributable to the automatic aspect of the subject belts may be substantially less than 11 percent.

The agency's analysis of the public comments and other available information leads it to conclude that it cannot reliably predict even a 5 percentage point increase as the minimum level of expected usage increase. The adoption of a few percentage points increase as the minimum would, in the agency's judgment, be more consistent with the substantial uncertainty about the usage rate of detachable automatic belts. Based on the data available to it, NHTSA is unable to assess the probability that the actual incremental usage would fall nearer a 0 percentage point increase or nearer some higher value like a 5 to 10 percentage point increase.

Thus, the agency concludes that the data on automatic belt usage in Rabbits and Chevettes does not provide a sufficient basis for reliably extrapolating the likely range of usage of detachable automatic belts by the general motoring public in all car size classes. Those data are not even sufficient for demonstrating the likelihood that those belts would be used in perceptibly greater numbers than the current manual belts. If the percentage increase is zero or extremely small due to the substantial similarity of the design and methods of using detachable automatic belts and manual belts, then the data regarding manual belt usage would be as reliable a guide to the effects of detachable automatic belts on belt usage as data regarding usage of nondetachable automatic belts. Indeed, the manual belt data may even be a more reliable guide since the data are based on usage by the general motoring public in cars from all size and demographic classes.

In view of the uncertainty about the incremental safety benefits of detachable automatic belts, it is difficult for the agency to determine that the automatic restraint requirements in their present form meet the need for safety.

In concluding that for this reason detachable automatic belts may contribute little to achieving higher belt usage rates, the question then arises whether the agency should amend the standard to require that automatic belts have a use-inducing feature like that of the Rabbit and Chevette automatic belts. NHTSA believes that such features would increase belt usage. The agency does not, however, believe that such devices should be mandated, for the reasons discussed in detail below.

Costs of automatic restraints. In view of the possibly minimal safety benefits and substantial costs of implementing the automatic restraint requirements, the agency is unable to conclude that the incremental costs of the requirements are reasonable. The requirements are, in that respect, impracticable. While the car manufacturers have already made some of the capital expenditures necessary to comply with the automatic restraint requirements, they still face substantial, recurring variable costs. The average price increase per car is estimated to be $89. The costs of air bags and some designs of automatic belts would be substantially higher. With a total annual production of more than 10 million cars for sale in this country, there would be a price effect of approximately $1 billion.

While the car manufacturers might be able to pass along some or all of their costs to consumers, the necessary price increases would reduce sales. There might not be any net revenue loss since the extra revenue from the higher prices could offset the revenue loss from the lower volume of sales. However, those sale losses would cause net employment losses. Additional sales losses might occur due to consumer uncertainty about or antipathy toward the detachable automatic belts which do not stow so unobtrusively as current manual lap and shoulder belts.

Consumers would probably not be able to recoup their loss of disposable income due to the higher car prices.

There does not appear to be any certainty that owners of cars with detachable automatic belts would receive offsetting discounts in insurance costs. Testimony and written comments submitted to the agency indicate premium reductions generally are available only to owners of cars equipped with air bags, not automatic belts. Some large insurance companies do not now offer discounts to any automatic restraint-equipped cars, even those with air bags. If insurance cost discounts were to be given owners of cars having detachable automatic belts, such discounts would be given only after the automatic belts had produced significant increases in belt usage, and in turn significant decreases in deaths and serious injuries. The apparent improbability of any economic effect approaching the magnitude of the consumer cost means that the discounts would not likely materialize on a general basis.

Insurance company statements at the August 1981 public meeting reaffirmed this belief as they state that they could not now assure reductions in insurance premiums but would have to first collect a considerable amount of claim data.

Finally, the weight added to cars by the installation of automatic belts would cause either increased fuel costs for consumers or further new car price increases to cover the incorporation of offsetting fuel economy improvements.

The agency does not believe that it would be reasonable to require car manufacturers or consumers to bear such substantial costs without more adequate assurance that they will produce benefits. Given the plans of the car manufacturers to rely primarily on detachable automatic belts and the absence of relevant data to resolve the usage question, implementation of the automatic restraint requirements amounts to an expensive federal regulatory risk. The result if the detachable automatic belts fail to achieve significant increases in belt usage could be a substantial waste of resources.

The agency believes that the costs are particularly unreasonable in view of the likelihood that other alternatives available to the agency, the states and the private sector could accomplish the goal of the automatic restraint requirements at greatly reduced cost. Like those requirements, the agency's planned educational campaign is addressed primarily to the substantial portion of the motoring public who are currently occasional users of manual belts.

Effect on public attitude toward safety. Although the issue of public acceptance of automatic restraints has already been discussed as it relates to the usage rate of detachable automatic restraints, there remains the question of the effect of automatic restraints on the public attitude toward safety regulation in general. Whether or not there would be more than minimal safety benefits, implementation of the automatic restraint requirements might cause significant long run harm to the safety program.

No regulatory policy is of lasting value if it ultimately proves unacceptable to the public. Public acceptability is at issue in any vehicle safety rulemaking proceeding in which the required safety equipment would be obtrusive, relatively expensive and beneficial only to the extent that significant portions of the motoring public will cooperate and use it. Automatic belt requirements exhibit all of those characteristics. The agency has given the need for public acceptability of automatic restraints substantial weight since it will clearly determine not only the level of safety benefits but also the general public attitude toward related safety initiatives by the government or the private sector.

As noted above, detachable automatic belts may not be any more acceptable to the public than manual belts at any given point in time. If the detachable automatic belts do not produce more than negligible safety benefits, then regardless of the benefits attributable to the small

number of other types of automatic restraints planned to be installed, the public may resent being required to pay substantially more for the automatic systems. Many if not most consumers could well conclude that the automatic belts would in fact provide them with no different freedom of choice about usage or levels of protection than manual belts currently offer. As a result, it is not unreasonable to conclude that the public may regard the automatic restraint requirements as an expensive example of ineffective regulation.

Thus, whether or not the detachable automatic belts might have been successful in achieving higher belt usage rates, mandates requiring such belts could well adversely affect public attitude toward the automatic restraint requirements in particular and safety measures in general. As noted in more detail in the 1976 Decision of Secretary Coleman.

> Rejection by the public would lead to administrative or Congressional reversal of a passive restraint requirement that could result in hundreds of millions of dollars of wasted resources, severe damage to the nation's economy, and, equally important, a poisoning of popular sentiment toward efforts to improve occupant restraint systems in the future.

It can only be concluded that the public attitude described by the Secretary at that time is at least as prevalent today. The public might ultimately have sought the legislative rescission of the requirements. Action-forcing safety measures have twice before been overturned by Congress. In the mid-1970's, Congress rescinded the ignition interlock provision and provided that agency could not require the States to adopt and enforce motorcycle helmet use laws. Some people might also have cut the automatic belts out of their cars, thus depriving subsequent owners of the cars of the protection of any occupant restraint system. These are serious concerns for an agency charged by statute with taking steps appropriate

for addressing safety problems that arise not only in the short term but also the long term. The agency must be able to react effectively to the expected increases in vehicle deaths and injuries during the 1980's.

Equity. Another relevant factor affecting the reasonableness of the automatic restraint requirements and of their costs is the equity of the distribution of such costs among the affected consumers. Responsible regulatory policy should generally strive to ensure that the beneficiaries of regulation bear the principal costs of that regulation. The higher the costs of a given regulation, the more serious the potential equity problem. The automatic restraint requirements of the standard would have required the current regular user of manual belts not only to pay himself for a system that affords him no additional safety protection, but in part to subsidize the current nonuser of belts who may or may not be induced by the automatic restraints to commence regular restraint usage.

Option of Adopting Use-Compelling Features. As noted above, some commenters have suggested that the only safety belts which are truly "passive" are those with use-compelling features. Such commenters have recommended that the agency amend the standard so as to require such features. For example, an ignition interlock which prohibits the car from starting unless the belt is secured is a use-compelling feature. Another example is a passive belt design which is simply not detachable, because no buckle and latch release mechanism is provided. While NHTSA agrees that such use-compelling features could significantly increase usage of passive belts, NHTSA cannot agree that use-compelling features could be required consistent with the interests of safety. In the case of the ignition interlock, NHTSA clearly has no authority to require such a use-compelling feature. The history of the Congressional action which removed this authority from NHTSA suggests that Congress would look with some

disfavor upon any similar attempt to impose a use-compelling feature on a belt system.

But, even if NHTSA were to require that passive belts contain use-compelling features, the agency believes that the requirement could be counterproductive. Recent attitudinal research conducted by NHTSA confirms a widespread, latent and irrational fear in many members of the public that they could be trapped by the seat belt after a crash. Such apprehensions may well be contributing factors in decisions by many people not to wear a seat belt at all. This apprehension is clearly a question which can be addressed through education, but pending its substantial reduction, it would be highly inappropriate to impose a technology which by its very nature could heighten or trigger that concern.

In addition, the agency believes there are compelling safety reasons why it should not mandate use-compelling features on passive belts. In the event of accident, occupants wearing belts suffer significantly reduced risk of loss of consciousness, and are commonly able to extricate themselves with relative ease. However, the agency would be unable to find the cause of safety served by imposing any requirement which would further complicate the extrication of any occupant from his or her car, as some use-compelling features would. NHTSA's regulations properly recognize the need for all safety belts to have some kind of release mechanism, either a buckle and latch mechanism or a spool-out release which feeds a length of belt long enough to extricate a car occupant.

Alternative methods of increasing restraint usage. Finally, the agency believes that it is possible to induce increased belt usage, and enhance public understanding and awareness of belt mechanisms in general, by means that are at least as effective but much less costly than the installation of millions of detachable automatic belts.

In the decision noted above, Secretary Coleman noted the obligation of the Department of Transportation to un-

dertake efforts to encourage the public to use occupant restraints, active or passive. Toward this point, Secretary Coleman directed the Administrator of NHTSA to undertake significant new steps to promote seat belt usage during the demonstration program. This instruction of the Secretary was not effectively carried out and unfortunately, we do not enjoy today the benefits of a prolonged Departmental campaign to encourage seat belt usage. Had such a program been successfully carried out, increased seat belt usage could have saved many lives each year, beginning in 1977.

Rather than allowing the Coleman demonstration program and its accompanying education effort to come to fruition, the Department reconsidered Secretary Coleman's 1976 decision during 1977. At the conclusion of the reconsideration period, the Department reversed that decision, and amended the standard to require the provision of automatic restraints in new passenger cars, in accordance with a phased-in schedule.

The benefits of any such belt use enhancement efforts could have already substantially exceeded those projected for the automatic restraint requirements of this standard. Over the next ten years, the requirements of the standard would have addressed primarily those occasional belt users amenable to change who buy new cars during the mid and late 1980's.

Prior to the initiation of rulemaking in February of this year, the Department had resolved to undertake a major educational effort to enhance voluntary belt usage levels. Such efforts will be closely coordinated with new and preexisting major initiatives at the State level and in the private sector, many of which were discussed at the public meeting on the present rulemaking. These efforts will address not only those users/purchasers amenable to change, but also those currently driving and riding in cars, multipurpose passenger vehicles and trucks on the road today. The potential for immediate impact is thus

many times greater. Further, with the much greater number of persons directly impacted, educational efforts would need to raise safety belt usage in the vehicles on the road during the 1980's by only a few percentage points to achieve far greater safety benefits than the automatic restraint requirements could have achieved during the same time period.

This is in no sense to argue or suggest that non-regulatory alternatives are or should be considered in all cases appropriate to limit Federal regulation. However, the existence of such efforts, and their relevance to calculations of benefits in the present case, must be and has been considered to the extent discussed herein.

Summary of Agency Conclusion

As originally conceived, the automatic restraint requirement was a far reaching technology forcing regulation that could have resulted in a substantial reduction in injuries and loss of life on our highways.

As it would be implemented in the mid-1980's, however, the requirement has turned into a billion dollar Federal effort whose main technological advance would be to require seat belts that are anchored to the vehicle door rather than the vehicle body, permitting these belts to be used either as conventional active belts or as automatic belts.

To gain this advantage, under the standard as drafted, consumers would see the end of the six passenger car and an average vehicle price increase on the order of $89 per car. The almost certain benefits that had been anticipated as a result of the use of air bag technology have been replaced by the gravely uncertain benefit estimates associated with belt systems that differ little from existing manual belts.

In fact, with the change in manufacturers' plans that in essence replaced air bags with automatic belts, the

central issue in this proceeding has become whether automatic belts would induce higher belt usage rates than are occurring with manual belts.

Many of the comments in the course of this rulemaking were directed specifically at the question of belt use. Most addressed themselves to the information in the docket on the usage witnessed in the VW Rabbit and Chevette equipped with automatic belts.

The agency's own analysis of the available information concludes that it is virtually impossible to develop an accurate and supportable estimate of future belt use increases based upon the Rabbit and Chevette automatic belt observations. The agency further believes that it is impossible to disaggregate the roles that demographics, use-inducing devices, and automatic aspects of the belt played in the observed increases.

Faced with this level of uncertainty, and the wide margins of possible error, the agency is simply unable to comply with its statutory mandate to consider and conclude that the automatic restraint requirements are at this time practicable or reasonable within the meaning of the Vehicle Safety Act. On the other hand, the agency is not able to agree with assertions that there will be absolutely no increase in belt use as a result of automatic belts. Certainly, while a large portion of the population appears to find safety belts uncomfortable or refuses to wear them for other reasons, there is a sizeable segment of the population that finds belts acceptable but still does not use them. It is plausible to assume that some people in this group who would not otherwise use manual belts would not disconnect automatic belts.

It is this same population that will generate all of the benefits that result directly and solely from this regulation. This is a population that can also be reached in other ways. The Agency, state governments and the private sector are in the process of expanding and initiat-

ing major national belt use educational programs of unprecedented scale. While undertaken entirely apart from the pending proceeding, the fact remains that this effort will predominantly affect the same population that the automatic belts would be aimed at.

On the one hand, it could be argued that the success of any belt use program would only be enhanced by the installation of automatic belts. Individuals who can be convinced of the utility of safety belts would presumably have an easier time accepting an automatic belt. On the other hand, there is little evidence that the standard itself will materially increase usage levels above those otherwise achievable.

However, the agency is not merely faced with uncertainty as to the actual benefits that would result from detachable automatic safety belts. When the uncertain nature of the benefits is considered together with the risk of adverse safety consequences that might result from the maintenance of this regulation, the agency must conclude that such retention would not be reasonable, and would not meet the need for motor vehicle safety.

It is useful to summarize precisely what the agency believes these risks might be. The principal risk is that adverse public reaction could undermine the effectiveness of both the standard itself and future or related efforts.

The agency also concludes, however, that retention would present serious risk of jeopardizing other separate efforts to increase manual belt usage by the Federal government, States and the private sector. A public that believes it is the victim of too much government regulation by virtue of the standard might well resist such parallel efforts to enhance voluntary belt usage. Further, to the extent that States begin to consider belt use laws as an option, a Federal regulation addressing the same issue could undermine those attempts as well.

While one cannot be certain of the adverse effects on net belt usage increases, it would be irresponsible to fail to

consider them. A decision to retain the regulation under any of the schedules now being considered would not get automatic belts on the road until 1983 and would not apply to the entire fleet of new cars until 1984. By the end of the 1984 model year, under most options, there would have been fewer than 20 million vehicles equipped with automatic belts on the road.

By the same time, however, there will be upward of 150 million vehicles equipped with only manual belts, drivers and occupants of which will have been exposed to interim belt usage encouragement efforts.

Agency analysis indicates that external efforts of whatever kind that increase usage by only 5 percent, will save more than 1300 lives per year beginning in 1983. Installation of automatic belts could save an equal number of lives in 1983 only with 95 percent belt usage.

Further, even if one is convinced that automatic belts can double belt usage and alternative efforts would only increase usage by 5 percent, it would not be until 1989 that total life savings attributable to automatic belts installed under the automatic restraint requirements would reach the total life savings achieved through such other efforts.

NHTSA fully recognizes that neither outcome is a certainty. Much closer to the truth is that both outcomes are uncertain. However, neither is significantly more likely than the other. That being the case, to impose the $1 billion cost on the public does not appear to be reasonable.

It is particularly unreasonable in light of the fact that the rescission does not foreclose the option to again reopen rulemaking if enhanced usage levels of both manual and automatic belts do not materialize. Long before there would have been any substantial number of vehicles on the road mandatorily equipped with automatic belts as a result of this standard, NHTSA will conclusively know whether other efforts to increase belt use have succeeded

either in achieving acceptable usage levels or in increased public understanding and acceptance of the need for further use-inducing or automatic protection alternatives. If so, obviously no further action would be needed. If such is not the case, rulemaking would again be a possibility. Any such rulemaking, following even partially successful efforts to increase belt use, would be much less likely to face public rejection.

It has been said that the Vehicle Safety Act is a "technology-forcing" statute. The agency concurs completely.

However, the issue of automatic restraints now before the agency is not a "technology-forcing" issue. The manual seat belt available in every car sold today offers the same, or more, protection than either the automatic seat belt or the air bag. Instead, the agency today faces a decision to force people to accept protection that they do not choose for themselves. It is difficult to conclude that the Vehicle Safety Act is, or in light of past experience could become, a "people-forcing" statute.

NHTSA cannot find that the automatic restraint requirements meet the need for motor vehicle safety by offering any greater protection than is already available.

After 12 years of rulemaking, NHTSA has not yet succeeded in its original intent, the widespread offering of automatic crash protection that will produce substantial benefits. The agency is still committed to this goal and intends immediately to initiate efforts with automobile manufacturers to ensure that the public will have such types of technology available. If this does not succeed, the agency will consider regulatory action to assure that the last decade's enormous advances in crash protection technology will not be lost.

Impact Analyses

NHTSA has considered the impacts of this final rule and determined that it is a major rulemaking within the

meaning of E.O. 12291 and a significant rule within the meaning of the Department of Transportation regulatory policies and procedures. A final regulatory impact analysis is being placed in the public docket simultaneously with the publication of this notice. A copy of the analysis may be obtained by writing to: National Highway Traffic Safety Administration, Docket Section, Room 5109, 400 Seventh Street, S.W., Washington, D.C. 20590.

The agency's determination that the rule is major and significant is based primarily upon the substantial savings in variable manufacturing costs and in consumer costs that result from the rescission of the automatic restraint requirements. These costs would have amounted to approximately $1 billion once all new cars became subject to the requirements. The costs would have recurred annually as long as the requirements remained in effect. There is also a recurring savings in fuel costs of approximately $150 million annually. Implementation of the automatic restraint requirements would have increased the weight of cars and reduced their fuel economy. In addition, the car manufacturers will be able to reallocate $400 million in capital investment that they would have had to allocate for the purpose of completing their efforts to comply with the automatic restraint requirements.

The agency finds it difficult to provide a reliable estimate of any adverse safety effects of rescinding the automatic restraint requirements. There might have been significant safety loss if the installation of detachable automatic belts resulted in a doubling of belt usage and if the question were simply one of the implementation or rescission of the automatic restraint requirements. The April 1981 NPRM provided estimates of the additional deaths that might occur as a result of rescission. However, those estimates included carefully drafted caveats. The notice expressly stated that the impacts of rescission would depend upon the usage rate of automatic belts and the effectiveness of the agency's educational campaign.

The agency has now determined that there is no certainty that the detachable automatic belts would produce more than a several percentage point increase in usage. The small number of cars that would have been equipped with automatic belts having use-inducing features or with air bags would not have added more than several more percentage points to that amount. Further, any potential safety losses associated with the rescission must be balanced against the expected results of the agency's planned educational program about safety belts. That campaign will be addressed to the type of person who might be induced by the detachable automatic belts to begin regular safety belt usage, i.e., the occasional user of manual belts. Since that campaign will affect occasional users in all vehicles on the road today instead of only those in new cars, the campaign can yield substantially greater benefits than the detachable automatic belts even with a much lower effectiveness level.

The agency has also considered the impact of this action on automatic restraint suppliers, new car dealers and small organizations and governmental units. Since the agency certifies that the rescission would not have a significant effect on a substantial number of small entities, a final regulatory flexibility analysis has not been prepared. However, the impacts of the rescission on the suppliers, dealers and other entities are discussed in the final Regulatory Impact Analysis.

The impact on air bag manufacturers is likely to be minimal. Earlier this year, General Motors, Ford and most other manufacturers cancelled their air bag programs for economic reasons. These manufacturers planned instead to rely almost wholly on detachable automatic belts. Thefore, it is not accurate to say, as some commenters did, that rescission of the automatic restraint requirements will "kill" the air bag. Rescission will not affect the air bag manufacturers to any significant degree. Further, the agency plans to undertake new

steps to promote the continued development and production of air bags.

The suppliers of automatic belts are generally the same firms that supply manual belts. Thus, the volume of sales of these firms is not expected to be affected by the rescission. However, there will be some loss of economic activity that would have been associated with developing and producing the more sophisticated automatic belts.

The effects of the rescission on new car dealers would be positive. Due to reduced new car purchase prices and more favorable reaction to manual belts than to automatic belts, sales increases of 395,000 cars were estimated by GM and 235,000 cars by Ford. While these figures appear to be overstated, the agency agrees that rescission will increase new car sales.

Small organizations and governmental units would be benefited by the reduced cost of purchasing and operating new cars. Given the indeterminacy of the usage rate that detachable automatic belts would have achieved, it is not possible to estimate the effects, if any, of the rescission on the safety of persons employed by these groups.

In accordance with the National Environmental Policy Act of 1969, NHTSA has considered the environmental impacts of the rescission and the alternatives proposed in the April 1981 NPRM. The option selected is disclosed by the analysis to result in the largest reductions in the consumption of plastics, steel, glass and fuel/energy. A Final Environmental Impact Statement is being placed in the public docket simultaneously with the publication of this notice.

This amendment is being made effective in less than 180 days because the date on which the car manufacturers would have to make expenditure commitments to meet the automatic restraint requirements for model year 1983 falls within that 180-day period.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, Federal Motor Vehicle Safety Standard No. 208, *Occupant Crash Protection* (49 CFR 571.208), is amended as set forth below.

§ 571.208 [Amended]

1. S4.1.2 is amended by revising it to read:

S4.1.2 *Passenger cars manufactured on or after September 1, 1973.* Each passenger car manufactured on or after September 1, 1973, shall meet the requirements of S4.1.2.1, S4.1.2.2 or S4.1.2.3. A protection system that meets the requirements of S4.1.2.1 or S4.1.2.2 may be installed at one or more designated seating positions of a vehicle that otherwise meets the requirements of S4.1.2.3.

2. The heading of S.4.1.2.1 is amended by revising it to read:

S4.1.2.1 *First option — Frontal/Angular Automatic protection system.*

• • • •

S.4.1.3 [Removed]

3. S4.1.3 is removed.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 Stat. 1392, 1407); delegation of authority at 49 CFR 1.50)

Issued on October 23, 1981.

Raymond A. Peck, Jr.,

Administrator.

APPENDIX

Editorial

Note.—This appendix will not appear in the Code of Federal Regulations.

Following is a summary of the major comments submitted in response to the April 9, 1981 notice of proposed rulemaking. A more detailed summary of comments has been placed in NHTSA Docket No. 74-14; Notice 22. This summary is organized in broad terms according to the interest groups from which the comments were received.

Insurance Companies

All commenting insurance companies strongly favored retention of the automatic restraint requirements. Many favored maintaining the present implementation schedule (i.e., September 1, 1982, for large and medium-sized cars and September 1, 1983, for small cars), although several companies stated they would support a change to require that small cars are phased in first or a simultaneous implementation date. Several insurance companies stated that air bags offer the best technology for saving lives and reducing injuries. These companies pointed out that repeated surveys have indicated that consumers appear to favor air bags, even if higher costs are likely. Several insurers argued that a retreat from the standard represents a breach of the Secretary's statutory obligation to reduce traffic accidents and deaths and injuries which result from them. One company argued that a delay in the standard (i.e., the delay and reversal alternative) would produce no measurable economic benefit to car makers and might possibly result in an economic loss to them. Nearly all the companies argued that the standard is cost-beneficial and represents the optimum approach to resolving this country's most pressing public health problem. Many companies stated that reduced insurance premiums resulting from the lives saved and injuries pre-

vented by automatic restraints would help offset the cost of those systems to consumers.

A majority of the insurance companies argued that seat belt use campaigns will not be effective in raising the current use rate of manual belts significantly. The companies pointed to the failures of all past campaigns to have any substantial impact on use rates. On the other hand, these companies believe that the use rate of automatic belts will be significant. The companies point to the current use data for automatic belts on VW Rabbits and Chevettes as evidence that automatic belt use will be significant. The companies believe that seat belt use campaigns should only be complimentary to automatic restraints, not a substitute.

Several insurance companies pointed to the huge economic losses resulting from traffic accidents. One company stated that these losses amount to over 1 billion dollars per year and result in recurring costs because of continuing medical problems such as epilepsy and quadriplegia. One company cited Professor William Nordhaus's analysis of the consequences of rescinding the standard as being equivalent to society's loss if the tuberculosis vaccine had not been developed, or if Congress repealed the Clean Air Act. In his submission on behalf of the insurance companies, Professor Nordhaus stated that fatalities will increase by 6,400 each year and injuries by 120,000 if the standard is rescinded. One company argued that the standard is cost-beneficial if automatic belt use rates increase usage only 5 percent. However, this company stated that use rates as high as 70 percent could be expected, and that the costs of rescinding the standard could reach as much as 2 billion dollars per year. This company also argued that the economic condition of the vehicle inindustry is no excuse for any delay in the standard and is not a statutorily justified reason for rescinding the standard.

Consumer Groups and Health Organizations

There were many consumer groups and health-related organizations which strongly urged that the automatic restraint requirements be maintained and that there be no further delays in the implementation schedule. Most of these groups argued that the costs of both air bags and automatic belts are greatly exaggerated by vehicle manufacturers. One group stated that the three alternative proposals are "naive and exhibit a callous disregard for human lives that flouts the agency's mandated safety mission." This group argued that a worst alternative is to rescind the standard and rely on education programs to increase the use of manual belts, since seat belt campaigns have failed repeatedly in this country. The group stated that the simultaneous implementation alternative in March 1983 ignores the industry's background of introducing safety changes only at the beginning of a new model year. Regarding a reversed phase-in schedule, the group stated that the requirement that small cars have automatic restraints by September 1, 1982, would not likely provide sufficient lead time for small car manufacturers. Additionally, with approximately 2 to 1 difference in seat belt use in small cars versus larger cars, it is not at all clear that the proposed reversal would make up for the delay in implementation in the larger cars in terms of lives saved. The group argued that the best alternative is to maintain the existing implementation schedule.

Several consumer groups argued that the center seating position should not be eliminated from the requirements for several reasons. First, they argued, this position is likely to be occupied by children. Second, the center seat requirement is one factor that will lead to the installation of air bags in some vehicles since current automatic belt designs cannot be applied to the center seat. Nearly all consumer groups argued that benefits of the automatic restraint standard far outweigh the costs.

One association stated that the air bag supplier industry could be forced out of business if substantial modifications and further delays are made to the standard. This would mean, the association argued, that the life-saving air bag technology could be lost forever. The association would support some modifications to the standard if there were some clear commitment by the Department that some car models would be required to offer the consumer the choice of air bags. The group noted that air bag suppliers have indicated that a sufficient production volume would result in air bag systems priced in the 200 to 300 dollar range.

Various health groups and medical experts argued that the pain and suffering resulting from epilepsy and paraplegia, as well as mental suffering and physical disfigurement, could be greatly reduced by the automatic restraint standard. These persons argued that the standard should be implemented as soon as possible.

One consumer oriented group did not support the automatic restraint standard. That foundation argued that the standard is not justified, particularly if it is complied with by means of air bags. The group stated that air bag effectiveness is overestimated since the agency does not include non-frontal crashes in its statistics. The organization argued that in many situations air bags are actually unsafe. This group also argued that the public acceptability of automatic seat belts is uncertain, and that a well-founded finding of additional safety benefits by the Department is required in order to justify retention of the standard.

Vehicle Manufacturers

The vehicle manufacturers, both foreign and domestic, were unanimously opposed to retention of the automatic restraint standard. Most manufacturers stated the predominate means of complying with the standard would be with automatic belts, and that such belts are not likely to

increase usage substantially. This is because most automatic belts will be designed to be easily detachable because of emergency egress considerations and to avoid a potential backlash by consumers that would be counterproductive to the cause of motor vehicle safety. The domestic manufacturers argued that the public would not accept coercive automatic belts (i.e., automatic belts with interlocks or some other use-inducing feature). Eliminating any coercive element produces, in effect, a manual belt, which will be used no more than existing manual systems.

The domestic manufacturers also argued that air bags would not be economically practicable and would, therefore, be unacceptable to the public. One manufacturer noted that current belt users will object strenuously to paying additional money for automatic belts that will not offer any more protection than their existing belts.

One manufacturer argued that the injury criteria specified in the standard is not representative of real injuries and should be replaced with only static test requirements for belt systems. The company argued that there are many problems with test repeatability under the 208 requirements.

All manufacturers of small cars stated that it would be impossible for them to comply with the standard by September 1, 1982, i.e., under the reversal proposal. These manufacturers stated that there is insufficient lead time to install automatic restraints in small cars by that date, and several foreign manufacturers stated they would not be able to sell their vehicles in that model year if the schedule is reversed. Most of the manufacturers, both domestic and foreign, stated that it is also too late to install automatic restraints in their small cars even six months earlier than the existing schedule, i.e., under the March 1983 simultaneous implementation proposal. Many manufacturers supported a simultaneous implementation if the standard is not rescinded, but requested that the

effective date be September 1, 1983, or later. The manufacturers argued that an effective date for small cars prior to September 1, 1983, would not allow enough time to develop acceptable, reliable and high quality automatic belts.

Nearly all vehicle manufacturers believe that an intensive seat belt education campaign can be just as effective as automatic restraints and without the attendant high costs of automatic restraints. Additionally, most foreign manufacturers recommended that mandatory seat belt use laws be enacted in lieu of automatic restraints.

One foreign manufacturer requested that any effective date for automatic restraints be "September 1 or the date of production start of the new model year if this date falls between September 1 and December 31". The company stated that this would allow manufacturers to continue production for several months of models that would then be phased out of production. However, a domestic vehicle manufacturer argued that this would give foreign manufacturers an unfair competitive advantage, and that current practice of September 1 effective dates should be retained.

Most manufacturers supported the proposal to exclude the center seating position from the automatic restraint requirements, in order to give manufacturers more design flexibility. However, the two domestic manufacturers which would be most affected by such an exception stated that it is too late for them to make use of such an exception for 1983 models. The two companies stated that such an exception would have benefits in the long run, however, and would allow them to continue production of six-seat passenger cars in the mid-1980's.

Suppliers and Trade Groups

Suppliers of air bag system components supported continuation of the automatic restraint requirements. One commenter stated that having to buckle-up is an act which

requires a series of psychological and physical reactions which are responsible for the low rate of manual seat belts. Also, this company stated that educational campaigns to increase belt use will not work.

One motor vehicle trade group stated that a study by the Canadian government has established the superiority of manual seat belt systems. This group argued that the automatic restraint requirements cannot be justified because any expected benefits are speculative.

One trade group voiced its concern about sodium azide (an air bag propellant) as it pertains to possible hazards posed to the scrap processing industry.

A group representing seat belt manufacturers stated that the most effective way of guaranteeing belt use is through mandatory belt use laws. That group believes that belt usage can be increased through public education, and that simple, easy to use automatic belts such as are currently on the VW Rabbit will also increase belt usage. This group did not support a simultaneous implementation date for automatic restraints, stating that this could put a severe strain on the supplier industry. The group did support elimination of the automatic restraint requirements for center seating positions.

An automobile association recommended equipping small cars with automatic restraints first. The association stated that a reversed phase-in schedule would protect a significantly large segment of the public at an earlier date, would reduce a foreign competitive advantage (under the existing schedule), and would give needed economic relief to large car manufacturers. This organization also recommended that, as an alternative, automatic restraints be required only at the driver's position. This would achieve three-quarters of the reductions in deaths and serious injuries now projected for full-front seat systems, yet cost only half as much.

Congressional Comments

Mr. Timothy E. Wirth, Chairman of the House Subcommittee on Telecommunications, Consumer Protection and Finance, made the following comments:

—The automatic restraint requirements would produce benefits to society far in excess of costs.

—The Committee findings strongly point to the necessity of requiring the installation of automatic crash protection systems, at a minimum, on a substantial portion of the new car fleet at the earliest possible date. Mr. Wirth suggested that the effective date for small cars be September 1, 1982, and for intermediate and large cars September 1, 1983.

—The economic conditions of the automobile industry should not be relevant to the NHTSA's decision on matters of safety. NHTSA's decision must be guided solely by safety-related concerns.

—The agency should not discount its own findings indicating high use of automatic belts (referring to the existing VW and Chevette automatic belt use data).

In a joint letter to the Secretary, eighteen Congressmen urged that the automatic restraint requirements be maintained. This letter noted that over 50,000 people are killed each year on the highways and stated: "While the tragedy of their deaths cannot be measured in economic terms, the tragedy of their serious injuries cost all of us billions of dollars each year in higher insurance costs, increased welfare payments, unemployment and social security payments and rehabilitation costs paid to support the injured and the families of those who have been killed." The letter stressed the Congressmen's belief that the automatic crash protection standard would produce benefits to society far in excess of its cost.

In a letter addressed to Administrator Peck, fifty-nine Congressmen urged that the automatic restraint standard

be rescinded. That letter stated: "The 208 standard persists as one of the more controversial federal regulations to be forced on the automobile industry. . . . The industry continues to spend hundreds of thousands of dollars every day in order to meet this standard, despite considerable evidence that any safety benefits realized by enforcing the standard woud be minimal."

Private Citizens

In addition to comments from the above groups and organizations, the agency also received general comments from numerous private citizens. These comments were almost equally divided in their support or opposition to the automatic restraint standard.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., *et al.*,
Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, *et al.*,
Respondents.

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, *et al.*,
Petitioners,

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent.

NOTICE OF FILING

Pursuant to this Court's June 1, 1982 opinion (Slip Op. at 76), the Respondent Administrator of the National Highway Traffic Safety Administration intends to publish the attached notice of proposed supplemental rulemaking in the Federal Register. The notice sets forth the Respondents' "schedule for resolving the questions raised in [the Court's] opinion." *Id.* The notice is being filed solely to comply with and meet the deadline imposed by the Court's opinion, and is done without prejudice to, and does not reflect a decision with respect to, the Respondents' rights to seek rehearing, rehearing *en banc* and/or a writ of certiorari from the Supreme Court.

Respondents continue to believe that rescission of provisions of Federal Motor Vehicle Safety Standard No. 208, requiring all manufacturers of new cars to install automatic restraint systems, is in all respects proper and lawful, and supported by evidence in the record. The reasons for the recission are fully articulated in the Preamble to the Respondent Administrator's Order of October 23, 1981.

Respectfully submitted,

J. PAUL MCGRATH
Assistant Attorney General

/s/ Michael F. Hertz
MICHAEL F. HERTZ
(202) 633-3180
Appellate Litigation Counsel
Civil Division
Department of Justice
Washington, D.C. 20530

Of Counsel:
FRANK BERNDT
Chief Counsel
STEPHEN P. WOOD
Assistant Chief Counsel
DAVID W. ALLEN
Assistant Chief Counsel
HUGH F. OATES
EILEEN T. LEAHY
SHIRLEY RANSOM
Attorneys
National Highway Traffic Safety
Administration
Department of Transportation
Washington, D.C. 20590

[Filed July 1, 1982]

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 571

[Docket No. 74-14; Notice 28]

Federal Motor Vehicle Safety Standards;
Standard No. 208, Occupant Crash Protection

AGENCY: National Highway Traffic Safety Administration (NHTSA).

ACTION: Notice of proposed supplemental rulemaking.

SUMMARY: This notice of proposed supplemental rulemaking is issued pursuant to the opinion of the U.S. Court of Appeals for the District of Columbia Circuit in *State Farm Mutual Automobile Insurance Co., et al.* v. *Department of Transportation, et al.* (D.C. Cir. No. 81-2220; consolidated with No. 81-2221; filed in NHTSA rulemaking docket as 74-14, N25-029). That case involves the judicial review of an order issued by the NHTSA Administrator rescinding the provisions of Federal Motor Vehicle Safety Standard No. 208 which required all manufacturers of new cars to install automatic restraint systems in those vehicles. The opinion and order of the Court of Appeals reversed the Administrator's order, but also denied the petitioners' requests to reinstate the effective dates of the automatic restraint requirement. Instead, the Court required the agency to conduct further proceedings pursuant to its direction.

The Department continues to believe that the decision to rescind the automatic restraint requirement of FMVSS No. 208 was not arbitrary and capricious, and that the Court committed reversible error in reversing that decision. This notice, however, sets forth NHTSA's plans for conducting additional proceedings relating to the rescission of the automatic restraint requirement of FMVSS No. 208.

In an attempt to respond to the Court's concerns, NHTSA seeks the comments of all interested parties on questions raised by the Court's opinion. Specifically, NHTSA seeks comments relating to the predicted usage of detachable automatic belts lacking use-compelling devices under the automatic restraint requirement, and regulatory alternatives such as amending the standard to require all automatic belts be nondetachable or to limit means of compliance to air bags only. Comments on these issues should be directed to possible rescission of the automatic restraint requirement, or, alternatively, to suspension of the automatic restraint requirement and/or adoption of a voluntary program of automatic restraints.

DATES: Comments are due 30 days after publication of this notice in the FEDERAL REGISTER. NHTSA will consider all comments and as soon as possible after the comment closing date issue any appropriate supplemental decision. Every effort will be made to complete this matter within 45 days after the close of the comment period. Alternatively, the agency may decide that further fact gathering is appropriate. In this event, NHTSA will publicly announce an extension of the time for a supplemental decision. Such fact gathering may include one or more studies of automatic belt usage which would take one or more years to complete.

ADDRESSES: Comments should refer to the docket number and be submitted to the Docket Section, Room 5109, National Highway Traffic Safety Administration, 400 Seventh Street, S.W., Washington, D.C. 20590. Docket hours are 8 a.m. to 4 p.m., Monday through Friday.

FOR FURTHER INFORMATION CONTACT:

Courtney M. Price, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810)

SUPPLEMENTARY INFORMATION:

On April 6, 1981, Secretary of Transportation Andrew L. Lewis issued a notice (incorporated herein by reference) proposing various alternatives for amending the provisions of Federal Motor Vehicle Safety Standard 208, *Occupant crash protection*, that would have required the front seating positions in all new cars to be equipped with automatic restraints (46 Fed. Reg. 21205). Two alternatives would have altered the schedule for implementing that requirement. The third alternative was the rescission of the requirement.

Based on the comments on the proposal and other available information, the NHTSA Administrator issued an order pursuant to section 103 of the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. 1392, amending Standard 208 by rescinding the automatic restraint requirement. (46 Fed. Reg. 53419; October 29, 1981.)

On June 1, 1982, the United States Court of Appeals for the District of Columbia Circuit reversed the rescission of the automatic restraint requirement, holding it to be "arbitrary and capricious." *State Farm Mutual Automobile Insurance Co., et al.* v. *Department of Transportation, et al.*, (D.C. Cir. Nos. 81-2220, 2221). While the Court accepted NHTSA's determination that under the existing standard detachable automatic belts lacking ignition interlocks would be installed in almost all cars, and that, when detached, these belts would be functionally identical to a manual belt, the Court found that NHTSA lacked evidence on what the predicted usage of such detachable automatic belts would be under the existing standard. The Court also concluded that NHTSA did not adequately consider regulatory alternatives such as amending the standard to require that all automatic belts be nondetachable, or to limit means of compliance to air bags only. While the Court denied the requests of petitioners to reinstate the automatic restraint requirement's effective dates, and directed withholding of the

mandate effecting its decision until after disposition of any motion for rehearing, it contemplated that NHTSA would conduct further proceedings in order to further justify its rescission.

To address the questions raised by the Court, NHTSA requests comments from any interested party on predicted usage of automatic restraint systems in general, and in particular of detachable automatic belts lacking an ignition interlock. In addition, NHTSA seeks suggestions on how studies to obtain reliable and statistically significant empirical evidence on usage may be feasibly undertaken in a reasonable period of time and at a reasonable cost.

In its own efforts to respond to the Court's decision, NHTSA has identified criteria which studies should satisfy in order to be feasible and successful and then develop various possible study formats that would involve equipping a large number of private cars, or more limited numbers of corporate fleet cars or rental fleet cars, with different types of detachable and nondetachable two and three point belts. NHTSA's preliminary consideration of such study formats have indicated potential difficulties such as obtaining sufficient volumes of reliable and statistically significant data, the costs and allocation of such costs among interested parties, the length of time required to conduct a study or studies, the representativeness of the fleets' belt systems and users, and the elimination of the aspect of economic or voluntary selection bias. These criteria, study formats and potential difficulties are described in an Appendix to this notice. NHTSA seeks comments on these or other study formats, from any interested party, especially those parties who might participate in such studies, such as manufacturers, rental agencies and/or corporate fleets. The agency requests that special attention be given to all such comments to the above described problem areas of cost, time, representativeness, and elimination of bias.

NHTSA also seeks comments from all interested parties on the questions raised by the Court, including specifically regulatory alternatives such as amending the standard to require that all automatic belts be nondetachable or to limit means of compliance to air bags only. Additional suggestions as to other alternatives which interested parties might feel meet the concerns advanced by the Court will of course be considered as well.

The information obtained from commenters and that already in the voluminous record of proceedings on this issue will be used by the agency to determine the appropriate step to be taken regarding future action concerning the automatic restraint requirement. In addition to the regulatory alternatives mentioned by the Court or which may be raised by interested parties, the suspension of this aspect of the standard or a reinstatement of the agency's rescission remain among the possible actions which might be taken by the agency.

Finally, beginning on the date of the Order of rescission, NHTSA has requested all of the major domestic and foreign car manufacturers who have in the past had an air bag development program at any level or stage of progress to participate in efforts leading to the voluntary introduction of air cushion restraints as options in new car lines. NHTSA has discussed with the Department of Defense and the General Services Administration, which operate the government's largest vehicle fleets, the possibility of participation by such agencies in any such demonstration program. NHTSA will continue its current efforts to seek voluntary commitments by automobile manufacturers to offer automatic restraints as options in fixed numbers of new cars. The agency seeks comments on these efforts as well as any other suggestions to promote voluntary development of advanced occupant protection technology.

All comments should have in mind NHTSA's statutory obligation to issue motor vehicle safety standards that it

finds are "reasonble," "appropriate," and "practicable," and "meet the need for motor vehicle safety and [are] stated in objective terms." (15 U.S.C. § 1392(a) and (f).)

Interested persons are invited to submit comments on the notice. It it is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length. Necessary attachments may be appended to these submissions without regard to the 15-page limit. Commenters are specifically urged to address factual data and comments to the issues addressed by the Court. Incorporation by reference of earlier testimony or comments to the docket is specifically urged. These limitations and requests are intended to encourage commenters to detail their primary arguments in a concise fashion.

The agency is providing a 30-day comment period to facilitate the early consideration and resolution of the issues discussed in this notice.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. Any claim of confidentiality must be supported by a statement demonstrating that the information falls within 5 U.S.C. section 552(b)(4), and that disclosure of the information is likely to result in substantial competitive damage; specifying the period during which the information must be withheld to avoid that damage; and showing that earlier disclosure would result in the damage. In addition, the commenter or, in the case of a corporation, a responsible corporate official authorized to speak for the corporation must certify in writing that each item for which confidential treatment is requested

is in fact confidential within the meaning of section 552 (b) (4) and that a diligent search has been conducted by the commenter or its employees to assure that none of the specified items has previously been disclosed or otherwise become available to the public.

All comments received before the close of business on the comment closing date indicated above will be considered, and will be available for examination in the docket at the above address. To the extent possible, comments filed after the closing date will also be considered. However, the agency may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. The NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

LIST OF SUBJECTS IN 49 CFR 571:

Imports
Motor vehicle safety
Motor vehicles
National Highway Traffic Safety Administration
Rubber and rubber products
Tires

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407))

Issued on

RAYMOND A. PECK, JR.
Administrator

APPENDIX

Staff Analysis of Possible Research Studies on Automatic Belt Usage

The agency has undertaken again to consider whether it is feasible to gather reliable and statistically significant data regarding the usage of detachable automatic belts lacking use-compelling devices.

Immediately following the issuance of the court's June 1, 1982 opinion and order, the Administrator directed the agency's technical, planning and legal staff to consider how the agency might attempt to gather empirical data which could form a valid basis for predicting changes in seat belt usage under the automatic restraint requirement. The staff was asked first to develop criteria which any research program should satisfy if it is to produce reliable data. The staff was asked then to devise different types of research programs in an effort to find one or more formats that might satisfy those criteria.

Agency staff developed tentative criteria which, if satisfied, could produce research results from which to predict the response of the general public on a nationwide basis to the equipping of new cars with automatic belts. These criteria reflect a variety of considerations, such as sensitivity of belt usage to car size, social and economic background of the motorists, and quality of the seat belt design.

General Criteria

First, the agency must be able to gather enough data regarding the reaction of motorists to these belts to provide statistically significant results. The staff believes that the goal of its research should be 95 percent confidence of accuracy within plus or minus 2 percentage points. Information on 1,875 people would be necessary to achieve that goal, with respect to each type of belt system involved. It should be noted that gathering sufficient data

to develop statistically significant results would not ensure that it would be possible to make valid inferences of behavior of the general population. It would be possible to draw valid conclusions about the belt usage rates of the general public only if the observed population is itself representative of the experience that the general public would have under the automatic restraint requirement.

Second, the research program should be a controlled experiment, comparing the use of one type of seat belt to that of other types under neutral, unbiased circumstances.

Third, the data should be gathered through direct observation instead of questionnaires or telephone inquiries. When subjects in indirect surveys are asked whether they have participated in behavior they perceive as socially desirable or responsible, respondents tend to overestimate participation. Agency experience confirms that this phenomenon occurs in belt usage surveys.

Fourth, it must be possible to secure cars equipped with subject belt systems (e.g., two-point and three-point automatic belts, both detachable and nondetachable), and arrange for them to be introduced into a target population.

Fifth, the users of the subject vehicles should be representative of the national population of motorists.

Sixth, the belts should be representative of the quality of the different belt designs that would be likely to be offered to the general public if the automatic restraint standard were implemented.

Seventh, these cars should be representative of the various size classes of cars available to the public.

Eighth, the users of these cars should have the same limited choice about using a car equipped with such a belt system as the general public would have under a mandatory requirement, i.e., no opportunity to reject all of the systems.

Ninth, the usage period should be long enough to enable them to react and behave naturally, and get over the novelty effect of the belt system. This would involve either extension of the study over a period of time sufficient for the user to cease to regard himself as a subject of a study, or the undertaking of the study without any awareness thereof by the subject population of users.

Other considerations include the time and cost necessary to complete the studies. Estimating duration of a study is an extremely uncertain exercise since it is not possible to determine the precise length of any of the study phases e.g., negotiation, letting of contracts, belt system design, belt system production, distribution of belt equipped cars, sale, rental or assignment of those cars, collection of data for the drivers of those cars, and analysis of the data.

The ultimate object of any study meeting these criteria is to generate data that would make it possible to predict the likely belt usage rates by the general public in cars produced under the automatic restraint requirement. The most direct way of generating these data is to observe randomly selected members of the general public. There is a major difficulty in proceeding in this fashion because the cars being studied would constitute an extremely small percentage of the total vehicle population. Increasing the target population of cars significantly to increase the rate of observation would be extremely expensive.

An alternative would be to study some surrogate population of cars whose use patterns are more regular and concentrated. This approach would increase the rate at which observers would spot the type of cars being studied. However, as discussed below, the faster rate of data accumulation is bought at the price of a variety of problems inherent in the use of surrogate populations.

Study Formats

With these criteria and the practical considerations of the rate of data accumulation in mind, three study formats suggest themselves.

The first would be a study of usage in cars sold to the general public. This study would involve large numbers of cars with various types and designs of automatic belts. The second would be a corporate fleet study. A limited number of cars equipped with automatic belts would be placed in a chosen corporate fleet and randomly assigned to users of fleet cars for relatively short periods of time. The third format would entail placing a limited number of cars equipped with automatic belts into a fleet with a less closed user population such as a rental car fleet, under stringent choice controls.

Private car study. The large number of cars involved in this study is intended to eliminate as much as possible the self-selection problem which taints the data relating to existing populations of automatic belt equipped cars. To further address that problem, there would not be any additional charge for automatic belt systems so that selection of cars with those systems would not be biased by the higher price that would otherwise have to be paid for them. By observing seat belt use in these cars by the general public for periods exceeding one year, several of the most serious biases of such studies might be effectively addressed. These include an observed belt usage decline as cars grow older and change owners.

The large number of cars required for such a study would be necessary to enable the agency to make the necessary amount of roadside observations. To avoid needing an even larger number of cars, the cars would be sold only in a limited geographic region. If it is possible to gain the cooperation of manufacturers and dealers to limit sales to a few cities, then only 160,000 cars would have to be equipped with the automatic belts and sold (40,000 cars for each of 4 types of automatic belts). If such cooperation could not be obtained, then a much larger number of cars would be necessary.

If it were possible to conduct this study on the limited scale suggested above, the study would require at least 18 months and possibly more than two years to complete.

This study format would be the most expensive of the studies considered by the agency, with cost estimated at $16 million.

Potential problems with this study format may include the following:

The difficulties of execution include obtaining cooperation and sales. Regardless of the scale of the study, there would be a question about the ability of the dealers to sell sufficient numbers of the cars. For example, although GM offered the continuous belts in 1980 Chevettes, only 13,000 out of several million of those cars were sold, with such belts, even though the first 8,000 were offered free, the balance were sold at a belt price below cost, and all were sold with a "secret" bonus to the salesman of $25.

Protracted negotiations for such cooperation could extend the above time estimates, which relate only to time projected by the agency for participating manufacturers to acquire, or, if necessary, design and produce the necessary belt systems and install them in sufficient numbers of new cars.

The cost of equipping necessary numbers of cars could be significant. Passing such costs through to purchasers could not only reduce acquisition, but would increase self-selection bias. Whether manufacturers, insurers or the agency would be able, alone or in concert, to underwrite the cost is uncertain.

Finally, even if sufficient numbers of equipped cars are sold to enable the agency to develop statistically significant results, the effect of self-selection could still be as strongly felt as it is among the existing population of automatic belt equipped Rabbits. To the degree sales fell below the desired levels, the self-selection problem would bias the results to an increasingly greater degree toward usage increase.

Corporate fleet study. Under this format, automatic belt equipped cars would be randomly assigned to succes-

sive different corporate employees. Use or nonuse of the belts would be observed or would be recorded by electronic devices in the cars. For this study, a relatively small number of cars, as few as 40 per seat belt type or a total of 160 cars, would be needed. This small number of cars is made possible by several factors. Since each car would pass through the possession of series of drivers, the seat belt usage choices of multiple drivers could be recorded for each car. Also, because the cars remain under the control of the fleet owner and must return periodically to a central location, observation would be much easier than under the private car study where the cars would be randomly scattered through the population. The need for cooperation of other parties may be limited to the need to find a willing corporate fleet owner. The direct economic cost of the belt systems for this study could be borne by the manufacturer, the fleet owner, the insurance carrier, the agency or some combination of those parties.

The corporate fleet study would be much less expensive and time-consuming than the private car study. The cost of the study would be from $300,000 to $400,000. It would take slightly less than a year to make the same number of observations that the private car study is intended to produce. However, if manufacturer designed and built belt systems are to be used, then additional cooperation and time would be needed. Also, it would require considerably longer than a year to complete if the desired number of cars and drivers are not available.

Potential problems with this study format may include the following:

Considerations of cost and time must be weighed together with factors potentially affecting the reliability of this study's results. First, the fleet owner may be one that promotes or in some way indicates a favorable attitude toward seat belt use by its employees. For example, it is likely that many fleet owners encourage belt use by employees using fleet cars while on corporate business.

Second, the employees of a single corporation may not be representative of the general public. This would be especially true with respect to those segments of the population most at risk, the youngest and oldest drivers, who are likely not to be represented at all. Third, there would be a risk that the existence of the study would become known to at least a portion of the closed population of employees eligible to drive cars in the corporate fleet. This knowledge could affect belt usage and thus taint the study results. Since belt usage is generally perceived as socially desirable, the bias would be toward higher usage figures. Fourth, the drivers would probably not treat the belts systems in these cars in the same fashion they would treat the belts in their own car. For example, an employee irritated by an automatic belt would be unlikely to damage the belt system in a company car, while a similarly irritated private car owner might cut the belt out of his or her car. Fifth, the relatively short period that each individual would be exposed to a given type of belt system would likely ensure that the novelty effect would not have any chance to wear off. The phenomenon of decline in belt usage as a function of time and familiarity would not have a chance to come into being and affect the belt usage observed in the study.

Rental car study. The object of this study would be to find a rental car population which experiences a relatively rapid turnover rate, such as the rental fleets at an airport. To avoid the difficulty that the agency's observers would encounter in making observations if a significant portion of the cars rented at the airport were returned to the rental company in other cities (intercity rentals), it would be necessary to select a fleet located in an area where such rentals are infrequent or to ensure that the specially equipped cars are limited to those persons not planning intercity travel.

This study would be similar to the corporate fleet study in several respects. Seat belt usage data could be gathered

by observation or electronic means. Data on belt usage by multiple motorists could be gathered for each car. The problem of self-selection would be significantly reduced if the cooperation of all rental companies regarding all car sizes could be obtained. Finally, the costs and number of cars also would be similar.

This study appears more attractive than the corporate fleet study in several respects. If the turnover rate is faster, the rental study would produce data on the number of drivers necessary to develop statistically significant results more quickly than would the corporate fleet study. However, rental frequency is difficult to predict. The rental study would also avoid the potential effects of the fleet owner's attitude toward belt usage and reduces the possibility that the existence of the study would become known to the users.

Potential problems with this study format may include the following:

The rental study would have many of the same difficulties that the corporate study would have in meeting the criteria, and in one instance those difficulties could be more severe. The drivers would not be representative of the general public. The typical renter of a car at an airport is likely to have a higher income than the average member of the driving public. The drivers would presumably not treat the belts in the same fashion that they would treat the belts in their own cars. The undesirable novelty effect could be accentuated by the very limited duration of most rentals. For the short duration of a rental, the drivers might well accept the inconvenience of a belt system that they would not accept in private vehicles.

The rental study may pose greater problems in gaining the cooperation of all necessary parties. The cooperation of all rental agencies at the site would be required, and the experimental belt systems would be required in all of their cars.

APPENDIX G

[46 Fed. Reg. 21205 (April 9, 1981)]

49 CFR Part 571

[Docket No. 74-14; Notice 22]

Federal Motor Vehicle Safety Standards;
Occupant Crash Protection

AGENCY: Department of Transportation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The purpose of this notice is to seek comment on a series of alternative amendments to the automatic restraint requirements of Safety Standard No. 208, *Occupant Crash Protection.* As amended by a final rule published in today's Federal Register, those requirements are currently scheduled to become effective for large cars and mid-size cars on September 1, 1982, and for small cars on September 1, 1983.

Under the first alternative being considered, the sequence of compliance would be changed so that small cars would be required to comply on September 1, 1982, mid-size cars on September 1, 1983, and large cars on September 1, 1984.

The second alternative would require all car sizes to begin compliance on March 1, 1983. In addition, the first and second alternatives would amend the automatic restraint requirements so that those restraints would not be required in the front center seating position.

The third alternative would rescind the automatic restraint requirements.

This action is being taken to ensure that Standard No. 208 reflects the changes in circumstances that have occurred since the automatic restraint requirements were issued in 1977, and to ensure that the standard meets the requirements of the National Traffic and Motor Vehicle

Safety Act of 1966 and Executive Order 12291, "Federal Regulation," (February 17, 1981).

DATE: Comments on this proposal must be received by: May 26, 1981.

ADDRESS: Comments should refer to the docket number and to the number of this notice and be submitted to: Docket Section, Room 5109, Nassif Building, 400 Seventh Street S.W., Washington, D.C. 20590. (Docket hours are 8:00 a.m. to 4:00 p.m.).

FOR FURTHER INFORMATION CONTACT: Mr. Michael Finkelstein, Office of Rulemaking, National Highway Traffic Safety Administration, Washington, D.C. 20590 (202-426-1810).

SUPPLEMENTARY INFORMATION: On February 12, 1981, the Department of Transportation published a proposal for a one year delay in the application of the automatic restraint requirements of Safety Standard No. 208 to large cars (46 FR 12033). That action was proposed in light of circumstances which made it necessary and appropriate to extend the effective date, and to provide an opportunity to review the requirements and determine the need for further revisions in the standard. In today's issue of Federal Register, the Department has published a final rule adopting the one year delay.

The purpose of this notice is to gather public comment to aid the review process. The notice proposes a wide range of possible changes to the automatic restraint requirements in order to encourage broad and creative public participation. The Department desires to ensure that it is taking the most effective and reasonable approach to addressing the serious safety problem posed by the low rate of safety belt use in all cars and by the steadily decreasing average size of new cars sold in this country. As discussed below, the Department is also undertaking an

intensive campaign to inform and encourage the public on the need for increased manual belt usage.

Background

The automatic restraint requirements of Standard No. 208 were adopted by the Department in 1977 (42 FR 34289; July 5, 1977). That decision was based on a variety of factors. The Department was confronted with a substantial safety problem. Approximately 25,000 occupants in the front seats of passenger cars were being killed annually in crashes. Although the cars were equipped with manual safety belts under Safety Standard No. 208, relatively few people were being protected since most people did not use manual belts. Studies showed that usage was about 20 percent for all types of belt systems.

The Department anticipated that this safety problem would progressively worsen as people began to switch to smaller, more fuel efficient cars. Generally, the chance of death or serious injury in a crash increases as car size decreases.

The Department concluded that there was no available way of increasing manual belt use. Although mandatory belt use laws had been used in combination in other countries to achieve dramatic increases in the rate of belt use, similar opportunities do not exist in this country. Based on Congressional action indicating disfavor with these laws and lack of State interest, enactment of mandatory use laws was not deemed to be a viable alternative.

To provide a solution to the problems of a high death and injury toll and of a low manual belt use rate, the Department turned to requiring the use of automatic restraints. Then, as now, the two systems that qualified as automatic restraints were air cushion restraints (air bags) and automatic seat belts (belts that automatically move into place when an occupant enters a vehicle and closes the door). Automatic restraints were found to be superior to manual belts because they were as effective as

manual belts in preventing death and injury and would provide protection in a much higher percentage of crashes. (Persons wishing to learn additional details about that and earlier rulemaking relating to automatic restraints are urged to consult dockets 69-7, 73-8 and 74-14 and the rulemaking notices associated with those dockets.)

The Department anticipated substantial safety benefits from the automatic restraint requirements. According to NHTSA's analysis, 9,000 fatalities and 65,000 serious injuries would be prevented annually once all cars on the road had automated restraints, i.e., ten years after initial implementation.

As the Department indicated in its February 12, 1981 proposal, the 1977 decision was based on a variety of key assumptions which, in the light of subsequent events, are no longer valid. The Department assumed that consumers would freely be able to choose between air bags and automatic belts, with 60 percent of cars having the former and 40 percent having the latter. The air bag percentage was based on the expectation that all large cars and intermediates, and half of the compacts would be equipped with those systems. The Department believed also that some of the even smaller cars would be equipped with air bags.

These factors, together with the greater design problems and absence of experience in installing air bags in smaller cars, led the Department to phase-in the automatic requirements beginning with large cars. Current manufacturer plans contemplate almost no installation of air bags, only about 1 percent of the total fleet of new cars. As a result, the phasing-in of the requirements with large cars first and small cars last requires reexamination.

The phase-in sequence is further called into question by the accelerated switch from large cars to less safe,

smaller ones. The Department recognized that a switch would occur as a result of 1973-74 oil shock and the impending implementation of fuel economy standards. It did not, however, anticipate that the switch would occur as rapidly as it has, due in large measure to the subsequent oil cut-off of 1979. In 1977, NHTSA estimated that size mix in the early 1980's would be 24 percent small cars, 53 percent mid-size cars, and 23 percent large cars. Now the expectation is that new car fleet will consist of 1 percent large cars, 58 percent mid-size cars and 41 percent small cars. When the numbers of large and small cars in the early-mid 1980's were expected to be approximately the same, the sequence of implementation had no significance in terms of the cars equipped with automatic restraints. Given the currently expected fleet mix of large and small cars, the sequence has substantial significance, especially since smaller cars are less safe.

In 1977, NHTSA believed that automatic belts would cost only 34 dollars more than manual belts and that air bags would cost approximately 154 dollars more than manual belts. Today, NHTSA's comparable figures are 105 dollars for the incremental cost of automatic belts, and at least 400 dollars for air bags at high production volumes and as much as 1,100 dollars at low volumes.

The Department has now undertaken to review the automatic restraint requirements and their implementation schedule in view of changed circumstances which undermine the reasonableness of the existing implementation schedule, the substantial impact of automatic restraints on manufacturer and consumer costs and the accentuation of those manufacturer impacts by the economic difficulties of the automobile industry.

In the analysis which preceded the February 12 proposal, the Department determined that a number of additional factors are relevant. Among these factors is the unnecessary character of the costs which would be incurred by application of automatic restraint requirements

to large cars scheduled to be phased-out in the near future. These costs would arise largely from the loss of sales due to increased costs, and to the loss of the middle front seating position in large cars.

Another factor is the possibility that initial public acceptance of automatic restraints might have been adversely affected by the decision of large car manufacturers not to make air bags available in model year 1982. Still another factor was the effect of current automatic belt designs on public acceptance and usage.

Based on all of these factors, the Department decided to adopt the one year delay for installing those restraints in large cars.

In conjunction with this decision, the Department is preparing to undertake an intensive public education campaign to induce the public to use their safety belts. This campaign would affect not only the 1982 model year cars which now will be equipped almost exclusively with manual belts but also all other belt-equipped vehicles on the road today. The number of seat belt-equipped vehicles is over 150 million. Accordingly, it is expected that a properly conceived and sustained program, aided by manufacturers and other levels of government, would make an important contribution of vehicle safety.

The same factors underlying the one year delay also lead the Department to issue this notice and propose three principal alternatives.

Principal Proposals

1. *Reversal of phase-in sequence.* Under this proposal, the automatic restraint requirements would become effective for small cars (wheelbase of 100 inches or less) on September 1, 1982, for mid-size cars (wheelbase greater than 100 inches and less than 114 inches) on September 1, 1983, and for large cars (wheelbase of 114 inches or greater) on September 1, 1984. This proposal would have

the advantage of ensuring that automatic restraints are first placed in the car size class which presents the greatest safety risk.

If adopted as proposed, it could produce greater net benefits than implementation of the automatic restraint requirements in accordance with the original phase-in schedule established in 1977. This gain would result from the greater safety risk posed by small cars than by large cars and the increasingly greater number of small cars over large ones.

The Department notes also that requiring small cars instead of large cars to comply first would require a much larger proportion of manufacturers to begin compliance simultaneously than under the original schedule. Thus, the new schedule would be more equitable and reasonable. Still another advantage of this proposal is that it would avoid, to a large extent, the necessity and extra cost of redesigning and equipping large cars with automatic restraints for the few years that these cars will continue to be produced. In view of the substantial experience of several manufacturers with designing and producing small cars with automatic belts, it is believed that there is sufficient leadtime to implement this proposal.

2. *Simultaneous compliance.* Under this proposal, all size classes would be required to begin compliance at the same time, i.e., March 1, 1983. This proposal allows compliance to begin a half year later than under the first proposal, to offset switching from a phase-in compliance schedule to a simultaneous one. Like the first proposal, this proposal could yield benefits greater than the original phase-in schedule by accelerating the date on which all cars must be equipped with automatic restraints. This proposal could be construed as even more equitable than the first in that all manufacturers would have to bring all of their cars into compliance at the same time.

3. *Rescission.* The third principal proposal is to rescind the automatic restraint requirements. The principal considerations underlying this proposal are the unlikelihood of public acceptability of automatic restraints in the absence of any significant degree of choice between automatic belts and air bags, the public acceptability of the specific automatic belt designs currently planned by the automobile manufacturers, uncertainties about the general public's rate of future usage of both automatic and manual belt systems, and the substantial cost of air bags even if produced in large volumes.

Additional Proposals

In conjunction with the first and second principal proposals, the Department is also proposing to except the front center seating position of cars from automatic restraint requirements. With that exception, manufacturers could equip that seating position with either a manual belt or with an automatic restraint. This exception is intended to solve a dilemma presented manufacturers in bringing six seat passenger cars into compliance with the current automatic restraint requirements. Since the only known type of automatic restraint for the center seating position is the air bag, manufacturers are faced with a choice of either equipping all three front seating positions with the relatively expensive air bag, or removing the center position and equipping the remaining two with automatic belts.

The latter choice permits use of the less expensive type of automatic restraint, but has the offsetting disadvantage of reducing the utility of the car. The advantage of such an exception is that it would enable manufacturers to retain the center position and equip the two outer front positions with automatic belts. If the automatic belts were the detachable type, they would permit ready access to the center position. The Department recognizes that usage rate of detachable automatic belts may be less than that for nondetachable types.

The Department also seeks comment on the desirability of and authority for adopting a suggestion made by Volvo in commenting on the February 12 proposal. Out of concern about the perceived marketing need for flexibility in the beginning of new model years and about the relative inflexibility of the normal agency practice of treating September 1 as the beginning of the model year, Volvo suggested that effective dates be specified as "September 1 or the date of production start of the new model year if this date falls between September 1 and December 31."

Impacts of Proposals

The Department has considered the impacts of these proposals and determined that each of the three principal proposals in the notice is a major rulemaking within the meaning of E.O. 12291. A preliminary regulatory impact analysis is being placed in the docket simultaneously with the publication of this notice. A copy of the analysis may be obtained by contacting the docket at the address given at the beginning of this notice.

As noted above, it is expected that both the reversal proposal and the simultaneous compliance proposal could produce benefits equal or greater than the benefits of the revised schedule. This would result primarily from the earlier compliance by small cars which pose greater safety risks than large or mid-size cars. Rescission of the automatic restraint requirements could, after ten years, cause a loss of 750-7,500 lives annually based on the benefits to be expected from all cars on the road having been equipped with automatic restraints by that time.

The precise safety impacts of these and the other proposals depend largely on the usage rate of automatic belts and the effectiveness of the planned public information campaign. As set forth in more detail in the regulatory impact analysis accompanying the Final Rule published elsewhere in the issue of the Federal Register, NHTSA

now anticipates a usage rate in the range of 15-60 percent. The rate will ultimately depend on how the public reacts to the automatic belt designs, especially the detachable ones which now appear likely to become the predominant type.

The cost effects of the reversal and simultaneuos compliance proposals would be mixed. For example, the reversal proposal would cause the manufacturing and consumer costs of model year 1983 small cars to increase and of model year 1983 mid-size and large cars to decrease. Some slight loss of sales or deferral of purchases of model year 1983 small cars and model year 1984 mid-size cars could occur, although such effects should be minimized by the market forces pushing consumers toward smaller, more fuel efficient cars.

The cost impacts of the simultaneous compliance proposal would depend on how near the manufacturers come to beginning compliance on March 1, 1983. If they began precisely on that date, then the manufacturer and consumer costs would decrease for the mid-size and large cars produced during the first half of model year 1983 and would increase for the small cars produced during the latter half of that model year. The effect on individual company sales should be minimized by this proposal, since competitive effects among manufacturers and different car size classes would be eliminated.

The rescission proposal would produce substantial savings in manufacturer capital investments and variable costs and in consumer costs. The savings in capital investments alone would be at least several hundred million dollars. The annual savings in manufacturing and consumer costs would be much greater, based on the costs that would otherwise be incurred in installing automatic restraints in all new cars.

The effects of this notice on small entities have been considered under the Regulatory Flexibility Act. Inter-

ested persons should consult both the preliminary regulatory impact analysis prepared for this notice and also the final regulatory impact analysis for the one year delay notice published today.

Although almost none of the direct or indirect suppliers of air bags and automatic belts are considered to be "small businesses," the Department did examine the impact on those suppliers. It is believed that the impact of the reversal and simultaneous compliance proposals should be minimal, because those proposals accelerate the compliance of some cars while delaying the compliance of others and since, in the case of automatic belt manufacturers, these businesses produce both automatic and manual belts.

Rescission of the automatic restraint requirements would adversely affect both automatic belt manufacturers and air bag manufacturers. To the extent that the profit to these manufacturers from automatic belt sales exceeds that from manual belt sales, the revenue of these manufacturers will decrease. Given the decision of the car manufacturers to use automatic belts almost exclusively in complying with the automatic restraint requirements, the impact of a rescission on air bag manufacturers may actually be quite limited. Nevertheless, the Department notes that air bag suppliers responding to its February 12 proposal stated that any further delay or uncertainty regarding the automatic restraint effective dates would adversely affect their prospect.

The only proposal that would more than minimally affect small governments and other small fleet purchasers would appear to be rescission. Its adoption would give them a cost savings similar to the one created for purchasers of large 1982 model year cars by the one year delay.

In accordance with the National Environmental Policy Act of 1969, the Department has considered the environ-

mental impacts of the proposals in this notice. A Draft Environmental Impact Statement will be placed in the docket for this rulemaking. Interested persons are also urged to consult the Final Environmental Impact Statement for the 1977 rule establishing the automatic restraint requirements.

Interested persons are invited to submit comments on the proposal. It is requested but not required that 10 copies be submitted.

All comments must be limited not to exceed 15 pages in length. Necessary attachments may be appended to these submissions without regard to the 15 page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the Docket Section. Any claim of confidentiality must be supported by a statement demonstrating that the information falls within 5 U.S.C. section 552(b)(4), and that disclosure of the information is likely to result in substantial competitive damage; specifying the period during which the information must be withheld to avoid that damage; and showing that earlier disclosure would result in that damage. In addition, the commenter or, in the case of a corporation, a responsible corporate official authorized to speak for the corporation must certify in writing that each item for which confidential treatment is requested is in fact confidential within the meaning of section 552 (b)(4) and that a diligent search has been conducted by the commenter or its employees to assure that none of the specified items has previously been disclosed or otherwise become available to the public.

All comments received before the close of business on the comment closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

(Secs. 103, 119, Pub. L. 89-563, 80 Stat. 718 (15 U.S.C. 1392, 1407))

Issued on April 6, 1981.

Andrew L. Lewis, Jr.,

Secretary of Transportation.

APPENDIX H

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1981

No. 81-2220

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO., KENT MASON, PATRICIA WARREN AND LEORLIN BOYD,
Petitioners

v.

DEPARTMENT OF TRANSPORTATION, DREW LEWIS, AS SECRETARY, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, AND RAYMOND A. PECK, JR., AS ADMINISTRATOR,
Respondents

SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AUTOMOBILE IMPORTERS OF AMERICA, INC., MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL., CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Intervenors

No. 81-2221

NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, AUTOMOBILE OWNERS ACTION COUNCIL, AND EUGENE J. MEYUNG,
Petitioners

v.

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION,
Respondent

AUTOMOBILE IMPORTERS OF AMERICA, INC.,
CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
MOTOR VEHICLE MANUFACTURERS ASSOCIATION, ET AL.,
SUPERINTENDENT OF INSURANCE OF THE
STATE OF NEW YORK,
Intervenors

Petitions for Review of an Order of the
National Highway Traffic Safety Administration

Before: BAZELON, *Senior Circuit Judge*, MIKVA and EDWARDS, *Circuit Judges*

JUDGMENT

These causes came on to be heard on petitions for review of an order of the National Highway Traffic Safety Administration and were argued by counsel. On consideration thereof, it is

ORDERED AND ADJUDGED by this Court that the order of the National Highway Traffic Safety Administration under review herein is vacated, and the cases are remanded to the National Highway Traffic Safety Administration for further proceedings consistent with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 1, 1982

Opinion for the Court filed by Circuit Judge Mikva.
Concurring opinion filed by Circuit Judge Edwards.

APPENDIX I

STATUTORY PROVISIONS INVOLVED

The pertinent section of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), provides as follows:

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The pertinent sections of the National Traffic and Motor Vehicle Safety Act of 1966, title I, as amended, 15 U.S.C. §§ 1381, 1391, 1392, 1394, and 1410b (1976 & Supp. IV 1980), provide as follows:

§ 1381. Congressional declaration of purpose

Congress hereby declares that the purpose of this chapter is to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determines that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development; and to expand the national driver register.

§ 1391. Definitions

As used in this subchapter—

(1) "Motor vehicle safety" means the performance of motor vehicles or motor vehicle equipment in such a manner that the public is protected against unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and is also protected against unreasonable risk of death or injury to persons in the event accidents do occur, and includes nonoperational safety of such vehicles.

(2) "Motor vehicle safety standards" means a minimum standard for motor vehicle performance, or motor vehicle equipment performance, which is practicable, which meets the need for motor vehicle safety and which provides objective criteria.

• • • •

(10) "Secretary" means the Secretary of Transportation.

* * * *

§ 1392. Motor vehicle safety standards

(a) Establishment

The Secretary shall establish by order appropriate Federal motor vehicle safety standards. Each such Federal motor vehicle safety standard shall be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms.

(b) Applicability of administrative procedure provisions

Subchapter II of chapter 5, and chapter 7, of title 5 shall apply to all orders establishing, amending, or revoking a Federal motor vehicle safety standard under this subchapter.

(c) Effective date of orders

Each order establishing a Federal motor vehicle safety standard shall specify the date such standard is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date such order is issued, unless the Secretary finds, for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

* * * *

(e) Amendment and revocation of standards

The Secretary may by order amend or revoke any Federal motor vehicle safety standard established under this section. Such order shall specify the date on which such amendment or revocation is to take effect which shall not be sooner than one hundred and eighty days or later than one year from the date the order is issued, unless the Secretary finds,

for good cause shown, that an earlier or later effective date is in the public interest, and publishes his reasons for such finding.

(f) Factors to be considered in prescribing standards

In prescribing standards under this section, the Secretary shall—

(1) consider relevant available motor vehicle safety data, including the results of research, development, testing and evaluation activities conducted pursuant to this chapter;

(2) consult with the Vehicle Equipment Safety Commission and such other State or interstate agencies (including legislative committees) as he deems appropriate;

(3) consider whether any such proposed standard is reasonable, practicable and appropriate for the particular type of motor vehicle or item of motor vehicle equipment for which it is prescribed; and

(4) consider the extent to which such standards will contribute to carrying out the purposes of this chapter.

* * * *

§ 1394. Judicial review of orders establishing standards; additional evidence before Secretary; certified copy of transcript

(a) (1) In a case of actual controversy as to the validity of any order under section 1392 of this title, any person who will be adversely affected by such order when it is effective may at any time prior to the sixtieth day after such order is issued file a petition with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such

order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary or other officer designated by him for that purpose. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based his order, as provided in section 2112 of title 28.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) Upon the filing of the petition referred to in paragraph (1) of this subsection, the court shall have jurisdiction to review the order in accordance with chapter 7 of title 5 and to grant appropriate relief as provided in such section.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(5) Any action instituted under this subsection shall survive, notwithstanding any change in the person occupying the office of Secretary o[r] any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(b) A certified copy of the transcript of the record and proceedings under this section shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, exclusion of imports, or other proceeding arising under or in respect of this subchapter, irrespective of whether proceedings with respect to the order have previously been initiated or become final under subsection (a) of this section.

§ 1410b. Occupant restraint systems

(a) Amendment of Federal motor vehicle safety standard numbered 208; effective date

Not later than 60 days after October 27, 1974, the Secretary shall amend the Federal motor vehicle safety standard numbered 208 (49 CFR 571.208), so as to bring such standard into conformity with the requirements of paragraphs (1), (2), and (3) of subsection (b) of this section. Such amendment shall take effect not later than 120 days after October 27, 1974.

(b) Federal motor vehicle safety standard requirements

After the effective date of the amendment prescribed under subsection (a) of this section:

(1) No Federal motor vehicle safety standard may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of,

any continuous buzzer designed to indicate that safety belts are not in use, or any safety belt interlock system.

(2) Except as otherwise provided in paragraph (3), no Federal motor vehicle safety standard respecting occupant restraint systems may—

(A) have the effect of requiring, or

(B) provide that a manufacturer is permitted to comply with such standard by means of

an occupant restraint system other than a belt system.

(3)(A) Paragraph (2) shall not apply to a Federal motor vehicle safety standard which provides that a manufacturer is permitted to comply with such standard by equipping motor vehicles manufactured by him with either—

(i) a belt system, or

(ii) any other occupant restraint system specified in such standard.

(B) Paragraph (2) shall not apply to any Federal motor vehicle safety standard which the Secretary elects to promulgate in accordance with the procedure specified in subsection (c) of this section, unless it is disapproved by both Houses of Congress by concurrent resolution in accordance with subsection (d) of this section.

(C) Paragraph (2) shall not apply to a Federal motor vehicle safety standard if at the time of promulgation of such standard (i) the 60-day period determined under subsection (d) of this section has expired with respect to any previously promulgated standard which the Secretary has elected to promulgate in accordance with

subsection (c) of this section, and (ii) both Houses of Congress have not by concurrent resolution within such period disapproved such previously promulgated standard.

(c) Federal motor vehicle safety standard promulgation procedure; rule making requirement; data, views or arguments; presentation opportunity; transcript; notification of Congressional Committees; data, views, or arguments of Members of Congress; transmittal of standard to Congress and Congressional Committees

The procedure referred to in subsection (b)(3)(B) and (C) of this section in accordance with which the Secretary may elect to promulgate a standard is as follows:

(1) The standard shall be promulgated in accordance with section 1392 of this title, subject to the other provisions of this subsection.

(2) Section 553 of title 5 shall apply to such standard; except that the Secretary shall afford interested persons an opportunity for oral as well as written presentation of data, views, or arguments. A transcript shall be kept of any oral presentation.

(3) The chairman and ranking minority members of the House Energy and Commerce Committee and the Senate Commerce, Science, and Transportation Committee shall be notified in writing of any proposed standard to which this section applies. Any Member of Congress may make an oral presentation of data, views, or arguments under paragraph (2).

(4) Any standard promulgated pursuant to this subsection shall be transmitted to both Houses of Congress, on the same day and to each House while it is in session. In addition, such

standard shall be transmitted to the chairmen and ranking minority members of the committees referred to in paragraph (3).

(d) Concurrent resolution of disapproval during prescribed period; Federal motor vehicle safety standard effective upon expiration of such period

(1) A standard which the Secretary has elected to promulgate in accordance with subsection (c) of this section shall not be effective if, during the first period of 60 calendar days of continuous session of Congress after the date of transmittal to Congress, both Houses of Congress pass a concurrent resolution the matter after the resolving clause of which reads as follows: "The Congress disapproves the Federal motor vehicle safety standard transmitted to Congress on ———, 19—."; (the blank space being filled with date of transmittal of the standard to Congress). If both Houses do not pass such a resolution during such period, such standard shall not be effective until the expiration of such period (unless the standard specifies a later date).

(2) For purposes of this section—

(A) continuity of session of Congress is broken only by an adjournment sine die; and

(B) the days on which either House is not in session because of an adjournment of more than 3 days to a day certain are excluded in the computation of the 60-day period.

(e) Judicial review of Federal motor vehicle safety standard

This section shall not impair any right which any person may have to obtain judicial review of a Federal motor vehicle safety standard.

(f) Definitions

For purposes of this section:

(1) The term "safety belt interlock" means any system designed to prevent starting or operation of a motor vehicle if one or more occupants of such vehicle are not using safety belts.

(2) The term "belt system" means an occupant restraint system consisting of integrated lap and shoulder belts for front outboard occupants and lap belts for other occupants. With respect to (A) motor vehicles other than passenger vehicles, (B) convertibles, and (C) open-body type vehicles, such term also includes an occupant restraint system consisting of lap belts or lap belts combined with detachable shoulder belts.

(3) The term "occupant restraint system" means a system the principal purpose of which is to assure that occupants of a motor vehicle remain in their seats in the event of a collision or rollover. Such term does not include a warning device designed to indicate that seat belts are not in use.

(4) The term "continuous buzzer" means a buzzer other than a buzzer which operates only during the 8 second period after the ignition is turned to the "start" or "on" position.

APPENDIX J

LISTING OF PETITIONERS AND THEIR PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

Petitioners are the Motor Vehicle Manufacturers Association of the United States, Inc. ("MVMA"), American Motors Corporation, Checker Motors Corporation, Chrysler Motors Corporation, Ford Motor Company, General Motors Corporation, Volkswagen of America, Inc., and Automobile Importers of America, Inc. ("AIA").

MVMA is an incorporated not-for-profit trade association. Its members are:

American Motors Corporation
Checker Motors Corporation
Chrysler Corporation
Ford Motor Company
Freightliner Corporation
General Motors Corporation
International Harvester Company
Mack Trucks, Inc.
Man Truck and Bus Corporation
PACCAR Inc.
Volkswagen of America, Inc.
Volvo North America Corporation

The publicly-identified * parent companies, subsidiaries (other than wholly-owned) and affiliates of each member of MVMA that is a petitioner in this case are listed below under the name of the related petitioner:

American Motors Corporation

Regis Nationale Des Usines Renault

Checker Motors Corporation

Calumet Ins. Co.

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* Standard & Poor's Corporation Records (1982) and Moody's Industrial Manual (1982).

Chrysler Corporation

Chrysler De Mexico S.A.
Aire y Temperatura S.A.
Chrysler Financial Corp. (Mich.)
Chrysler Canada Ltd. (Canada)
Perth Metal Industries, Ltd. (Canada)
Chrysler Credit Corp. (Del.)
Chrysler Leasing Corp. (Del.)
Chrysler Credit SBL Corp. (Mich.)
Chrysler Insur. Co. (Mich.)
Chrysler Life Insur. Co. (Mich.)
Redisco Canada Ltd. (Canada)
Chrysler Credit Venezuela S.A. (Del.)
Chrysler Credit Canada Ltd. (Canada)
Beaugency Limitee (Quebec)
Chrysler Finance Limited (Ontario)
Chrysler Life Insurance Co. of Canada (Canada)
Chrysler Commercial S.A. De C.V. (Mexico)
Chrysler Financial Overseas Capital N.V.
(Netherlands Antilles)
Chrysler Leasing, Ltd. (Canada)
Mitsubishi Motors Corp.
PSA Peugeot — Citroen

Ford Motor Company

Ford Motor Land Development Corp.
Ford Leasing Development Co.
Transcon Insurance Ltd.
Detroit Downtown Development Corp.
Ford Motor Co. of Canada, Ltd. (Canada)
Ford Motor Co. of Australia, Ltd. (Australia)
Ford Motor Co. of South Africa (Pty.) Ltd. (S.A.)
Ford Motor Co. (Belgium) N.W. Belgium
Ford-Werke AG (Germany)
Ford Nederland N.V. (Netherlands)
Ford Brasil S.A. (Brazil)
Ford Motor Co. A/S (Denmark)
Toyo Kogyo Co., Ltd.
Ford Motor Credit Co.

General Motors Corporation

General Motors Acceptance Corp. (N.Y.)
GMAC, Australia (Del.)
GMAC of Canada, Ltd. (Canada)
GMAC, South America (Del.)
GMAC, Suisse S.A. (Switzerland)
GMAC, Continental (Del.)
GMAC, International (Del.)
GMAC, Italia S.p.A. (Italy)
GMAC De Mexico, S.A. (Mexico)
GMAC (N.Z.) Ltd. (New Zealand)
GMAC South Africa (Proprietary) Ltd. (South Africa)
GMAC Nederland, N.V. (Netherlands)
GMAC (U.K.) Ltd. (England)
GMAC, Colombia S.A. (Del.)
GMAC Overseas Finance Corp. N.V. (Netherlands Antilles)
GMAC Commercial Automotriz Chile S.A. (Chile)
GMAC Automotriz Limitada (Chile)
GMAC Commercial Corp. (Del.)
GMAC Leasing Corp. (Del.)
Opel Kredit Bank GmbH (Germany)
Motors Insurance Corp. (N.Y.)
CIM Insurance Corp. (N.Y.)
MIC General Insurance Corp. (Ind.)
MIC Life Insurance Corp. (Del.)
MIC Property and Casualty Insurance Corp. (Mich.)
MIC Services Corp. (Del.)
Cadmic Agency Corp. (Del.)
Trinity General Agency, Inc. (Tex.)

Fabrica Colombiana De Automotores S.A. (Columbia)
General Motors Pilipinas, Inc. (Philippines)

Volkswagen of America, Inc.

Volkswagenwerk AG
- Deutsche Automobil g.m.b.H.
- AUDI NSU AUTO UNION AG
- TAS Tvornica Automobila Sarajevo
- WESER-EMS Vertriebs G.m.b.H.
- Forjaria Sao Bernardo S.A.
- Companhia Vale Do Rio Cristalino S.A.
- interRent Trucks S.A.
- TRIUMPH-ADLER AG
- Adlerwerke vorm. Heinrich Kleyer AG
- Volkswagen Do Brazil, S.A.
- Volkswagon Argentina

AIA is a not-for-profit trade association incorporated in the District of Columbia. It has no parents, subsidiaries or affiliates. Its members are:

- Alfa Romeo, Inc.
- American Honda Motor Company, Inc.
- BMW of North America, Inc.
- De Lorean Motor Company
- Fiat Motors of North America, Inc.
- Isuzu Motors Limited
- Jaguar Rover Triumph, Inc.
- Lotus Cars Limited
- Mazda Motors of America, Inc.
- Mitsubishi Motors Corporation
- Nissan Motor Corporation in U.S.A.
- Peugeot Motors of America, Inc.
- Rolls-Royce Motors, Inc.
- Saab-Scania of America, Inc.
- Subaru of America, Inc.
- Toyota Motor Sales, U.S.A., Inc.
- Volvo North America Corporation

The AIA subscribing members whose interests are represented here are:

Hyundai Motor Co., Ltd.
Renault USA, Inc.
Satra Corporation
U.S. Suzuki Motor Corporation
Yamaha Motor Corporation, U.S.A.